

United States
Court of Appeals
for the Ninth Circuit

DEERING-MILLIKEN & CO., INC., a corpora-
tion, Appellant,

vs.

MODERN-AIRE OF HOLLYWOOD, INC., a cor-
poration, Appellee.

Transcript of Record

In Two Volumes

VOLUME I.

(Pages 1 to 352, inclusive).

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

OCT 29 1954

PAUL P. O'BRIEN,
CLERK



No. 14481

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Court of Appeals
for the Ninth Circuit

DEERING-MILLIKEN & CO., INC., a corporation,
Appellant,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the South-
ern District of California, Central Division

No. 14428-T.

MODERN-AIRE OF HOLLYWOOD, INC., a
California corporation, Plaintiff,

vs.

DEERING-MILLIKEN & CO., INC., a New York
corporation, JOHN DOE ONE, JOHN DOE
TWO, RICHARD ROE CORPORATION
ONE and RICHARD ROE CORPORATION
TWO, Defendants.

COMPLAINT FOR DAMAGES FOR BREACH
OF CONTRACT

Comes Now Modern-Aire of Hollywood, Inc., a
California corporation, plaintiff in the above en-
titled action, and for cause of action against the
defendants, and each of them, complains and alleges
as follows:

I.

That at all times herein mentioned, the plaintiff
was and is now a corporation organized under and
pursuant to the statutes of the State of California,
maintaining its principal office for the conduct of
its business at 1112 Sentous Street, Los Angeles,
California; that at all times herein mentioned, the
defendant Deering-Milliken & Co., Inc. was and is
now a corporation incorporated under the laws of
the State of New York; that it maintains an office
for the transaction of business in the City of Los

Angeles, [2] County of Los Angeles, State of California; and that the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3000.00.

II.

That the defendants John Doe One, John Doe Two, Richard Roe Corporation One and Richard Roe Corporation Two are sued herein under fictitious names for the reason that plaintiff is ignorant of the true names of such defendants; that as soon as plaintiff ascertains their true names, plaintiff will ask leave of Court to amend and insert said true names in lieu of said fictitious names.

III.

That at all times herein mentioned, the defendant Deering-Milliken & Co., Inc. was engaged in the textile business pursuant to which it contracted with various and divers persons, including this plaintiff, to manufacture or have manufactured for said various and divers persons, including this plaintiff, textiles and textile products.

IV.

That on or about the 14th day of March, 1952, in the City of Los Angeles, County of Los Angeles, State of California, the plaintiff and the United States of America, by and through the Department of the Army, Los Angeles Ordnance District, made, executed and delivered a contract in writing pursuant to the terms and provisions of which the plaintiff agreed to manufacture and deliver to the

United States of America as aforesaid, 459,200 of a certain ordnance item designated in said contract as: "Liner, (Inner), Assembly, for case, Cartridge, 105mm, M32" for which said items the United States of America, as aforesaid, promised and agreed to pay unto the plaintiff herein the sum of \$69,339.20 based upon a charge [3] of \$0.151 for each of said 459,200 liners. That said contract was and is designated by the United States of America as Contract No. DA-04-495-ORD-278.

V.

That by the terms and provisions of said written contract, it was further provided and agreed that variations in the quantity of said items to be delivered to the extent of two percent (2%) more or less than the number of said items provided to be manufactured, to wit, 459,200, would be allowable by and acceptable to the United States of America, provided such variation was caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes.

VI.

That it was further provided and agreed in said written contract that by virtue of the permitted variation in quantity as aforesaid, to wit, two percent (2%), plaintiff was authorized to manufacture or have manufactured, and thereupon deliver to the United States of America as aforesaid, a maximum total of 468,384 each of said inner assembly liners.

VII.

That it was further provided and agreed in said written contract, that upon the manufacture and delivery of 468,384 of the aforesaid inner assembly liners, the United States of America would pay to plaintiff the total purchase price of \$70,725.98 at the times provided in said contract.

VIII.

That it was further provided and agreed in said written contract that the aforesaid inner assembly liners were required to [4] be manufactured of rayon cloth and in accordance with certain specifications designated as military specifications PA-PD-29 dated March 2, 1951, as amended by amendment 1 dated May 7, 1951. That said specifications provided that the said inner assembly liners were to be manufactured of rayon cartridge cloth, and further designated and described the required color, appearance, width, weight, breaking strength, allowable ether extract, allowable acidity or alkalinity, permissible ash content, air permeability and workmanship of and to be employed in the manufacture of said rayon cartridge cloth.

IX.

That prior to the aforesaid 14th day of March, 1952, to wit, on or about December 18, 1951, plaintiff and the United States of America, as aforesaid, first had conversations wherein plaintiff and the United States of America, as aforesaid, discussed the conditions, circumstances, terms and manner

under and in which plaintiff might undertake and agree to manufacture and deliver to the United States of America, the aforesaid ordnance items. That said conversations, together with certain negotiations in writing, were continued and carried on by and between plaintiff and the United States of America, as aforesaid, until and including said 14th day of March, 1952, on which date the aforesaid written contract was made, executed and delivered.

X.

That prior to the aforesaid 14th day of March, 1952, to wit, sometime during the month of January 1952, plaintiff and the defendant Deering-Milliken & Co., Inc. had conversations wherein the plaintiff and the said defendant discussed the conditions, circumstances, terms and manner under and in which the said defendant might undertake and agree to manufacture or have manufactured and [5] delivered to the plaintiff the said rayon cartridge cloth to be used by said plaintiff in the manufacture of the aforesaid ordnance items under and pursuant to the aforesaid contract of March 14, 1952. That said conversations, together with certain negotiations in writing were continued and carried on by and between the plaintiff and said defendant until on or about the 6th day of March, 1952, on or about which said date a contract was made, executed and delivered upon the terms and conditions hereinafter set forth.

XI.

That on the occasion of the first conversation

with defendant and at all times thereafter during the course of additional and further conversations, and in said negotiations in writing, to and including on or about the 6th day of March, 1952, the plaintiff stated to the defendants, and each of them, both in writing and orally, that the said rayon cartridge cloth was being purchased by the plaintiff for use in the manufacture of the said inner assembly liners; that said inner assembly liners were to be furnished to the United States of America by the plaintiff under and pursuant to the terms and provisions of a written contract to be made, executed and delivered by and between the plaintiff and the United States of America; and that said defendants, and each of them, would, therefore, be required to manufacture said rayon cartridge cloth in accordance with the aforesaid military specifications PA-PD-29 as amended. That a written copy of the military specifications PA - PD - 29, as amended, had been delivered to the defendant Deering-Milliken & Co., Inc., some time prior to the month of January, 1952 as aforesaid, and that at all times herein mentioned, said defendants had knowledge of and were fully aware of said specifications.

XII.

That thereafter, to wit, on or about the 6th day of March, [6] 1952, and following certain oral and written negotiations as aforesaid, had by and between plaintiff and defendant Deering-Milliken & Co., Inc., the said defendant acknowledged, advised and informed plaintiff in writing, that by virtue of

said writing, a contract had been made and executed by and between the plaintiff and said defendant pursuant to the terms and provisions of which the said defendant agreed to manufacture and deliver to the plaintiff, 126,000 yards of rayon cartridge cloth to be manufactured pursuant to the aforesaid military specifications PA-PD-29 as amended, for the purchase price of 36 $\frac{1}{8}$ c per yard or a total purchase price of \$45,517.50.

That by the terms and provisions of said writing of March 6, 1952, it was provided and agreed by and between plaintiff and said defendant that delivery of said rayon cartridge cloth was to start in April, 1952 and that said delivery was to be "spread out to completion".

XIII.

That by the terms and provisions of said writing dated March 6, 1952, it was provided and agreed by and between the plaintiff and defendant Deering-Milliken & Co. Inc. that said contract as aforesaid was subject to the receipt by the plaintiff of a contract from the United States of America and further that said contract was predicated upon the ability of the defendant Deering-Milliken Co. Inc. to "handle the business" when the plaintiff was in a position to confirm the fact that a contract had been received from the United States of America.

XIV.

That thereupon, to wit, on the said 14th day of March, 1952, and in sole reliance upon the defendant's promise and agreement contained in the afore-

said writing of March 6, 1952, the aforesaid [7] contract of March 14, 1952 by and between the plaintiff and the United States of America as aforesaid, and which said contract is more specifically described hereinabove, was made, executed and delivered.

XV.

That immediately following the execution of said contract of March 14, 1952 by and between the plaintiff and the United States of America as aforesaid, the plaintiff orally advised the said defendant Deering-Milliken & Co. Inc. that the aforesaid written contract of March 14, 1952 by and between the plaintiff and the United States of America, as aforesaid, had been made, executed and delivered.

XVI.

That thereafter, to wit, under date of March 14, 1952, defendant Deering-Milliken & Co. Inc. made, executed and delivered an instrument in writing designated Memorandum of Order addressed to the plaintiff herein, which said Memorandum of Order provided as follows:

(a) That delivery of 1/6 of the aforesaid rayon cartridge cloth was to be made every two weeks, starting with the earliest possible date, but not later than April 18, 1952, delivery to be made from Charleston, South Carolina;

(b) That the price thereof was to be 36 $\frac{1}{8}$ c each per yard, payable on terms of net 30 days;

(c) That the plaintiff was to forthwith make an advance payment in an amount of money equal to

10% of the purchase price provided to be paid by the terms of the aforesaid writing dated March 6, 1952; and [8]

(d) That said rayon cartridge cloth was to be shipped in bales.

That there was further contained in said Memorandum of Order an acknowledgment by the said defendant in writing that the said rayon cartridge cloth was being taken for government use.

XVII.

That thereafter, to wit, on or about the 20th day of March, 1952, and in compliance with and pursuant to the terms and provisions of the aforesaid writing of March 6, 1952, and the aforesaid Memorandum of Order dated March 14, 1952, the plaintiff drew its check No. 1163 in the amount of \$4551.75 payable to the order of Deering-Milliken & Co. Inc., the defendant herein, and did thereupon on said 20th day of March, 1952 deliver said check to the defendant Deering-Milliken & Co. Inc.

That said check was tendered and delivered as the aforesaid advance payment on the said total purchase price provided to be paid by plaintiff to said defendant as aforesaid.

XVIII.

That thereafter, to wit, on or about the 25th day of March, 1952, the said defendant Deering-Milliken & Co. Inc. advised the plaintiff in writing that it, the said defendant, would not deliver the rayon cartridge cloth provided for in the aforesaid contract

of March 14, 1952, by and between the plaintiff and the United States of America, which said cloth the defendant had theretofore promised and agreed to deliver to the plaintiff for the purpose of enabling plaintiff to perform according to the terms and provisions of said contract of March 14, 1952.

XIX.

That thereafter, to wit, on or about the 27th day of [9] March, 1952, and thereafter on or about the 1st day of April, 1952, on or about the 7th day of April, 1952, on or about the 11th day of April, 1952, and on or about the 21st day of April, 1952, the plaintiff requested of the said defendant, in writing, to perform the contract heretofore made by and between the plaintiff and said defendant but said defendants, and each of them, thereafter failed and refused to deliver to the plaintiff said rayon cartridge cloth or any portion thereof and no delivery thereof, or any portion thereof, has been made by the defendants, or any of them, pursuant to the agreement between the plaintiff and defendant as aforesaid, or otherwise, or at all.

XX.

That at all times herein mentioned, the defendants, and each of them, knew, and the plaintiff had so informed said defendants, and each of them, that said rayon cartridge cloth was being purchased by the plaintiff so that plaintiff could in turn execute and perform the aforesaid contract of March 14,

1952 by and between the plaintiff and the United States of America as aforesaid.

XXI.

That the defendants, and each of them, knew or should have known that the terms and provisions of the aforesaid contract of March 14, 1952 would allow to the plaintiff a certain profit after payment by the plaintiff to the defendant of the aforesaid purchase price of \$45,517.50, and said profit so anticipated by the plaintiff was reasonably within the knowledge and the contemplation of the plaintiff and said defendant at all times during the period January, 1952, to and including the said 14th day of March, 1952.

XXII.

That plaintiff would have been required to expend, in [10] the manufacture of said inner assembly liners as required by the terms and provisions of said contract of March 14, 1952, including therein the cost of said rayon cartridge cloth, the total sum of \$57,608.60 for which said inner assembly liners, when delivered to the United States of America, the plaintiff would be paid the sum of \$70,725.98 as aforesaid.

XXIII.

That by reason of the breach of the said agreement by and between the plaintiff and defendant Deering-Milliken & Co. Inc. as aforesaid, the plaintiff has, therefore, been damaged in the sum of \$13,117.38.

XXIV.

That at all times herein mentioned, the defendants, and each of them, knew or should have known, that in the event of the failure, refusal or neglect of any by the said defendants, or any of them, to perform the aforesaid agreement by and between the plaintiff and the defendant Deering-Milliken & Co. Inc., the United States of America would, under and pursuant to statutes provided therefor terminate the aforesaid contract of March 14, 1952 by and between the plaintiff and the United States of America and would charge the said plaintiff as being accountable for any and all damages sustained by the United States of America by reason of the failure, refusal or neglect of the plaintiff to perform the aforesaid contract of March 14, 1952.

XXV.

That on or about the 2nd day of June, 1952, the United States of America did by and through its agents, employees and representatives, deliver to the plaintiff herein a written Notice of Termination for Default, relating to the aforesaid contract of [11] March 14, 1952.

XXVI.

That thereafter, to wit, on or about the 8th day of June, 1952, the United States of America, by and through its agents, employees and representatives in the Department of the Army demanded of the plaintiff in writing that the plaintiff pay unto the United States of America the sum of \$4100.66, said sum being the excess amount required to be

paid by the United States of America for the procurement of the inner assembly liners which the plaintiff promised and agreed to manufacture and deliver to the United States of America pursuant to the terms and provisions of the aforesaid contract of March 14, 1952.

XXVII.

That plaintiff is informed and believes, and basing this allegation upon such information and belief alleges that the United States of America, by and through its agencies created therefor, will, in due course, proceed against the plaintiff in the manner and form provided by law, to enforce payment of said sum of \$4100.66.

XXVIII.

That by reason of the breach by the said defendants, and each of them, of the said agreement between plaintiff and defendant Deering-Milliken & Co. Inc., plaintiff has been damaged in the further and additional sum of \$4100.66.

Wherefore, plaintiff prays judgment against the defendants, and each of them, as follows:

(a) For damages in the sum of \$17,118.04 plus interest thereon at the rate permitted [12] by law from the 25th day of March, 1952;

(b) For plaintiff's costs of suit; and

(c) For such other and further relief, as the Court may deem meet and proper.

AARON L. LINCOFF and
GILBERT KLEIN,

/s/ By AARON L. LINCOFF,

Attorneys for Plaintiff [13]

Duly Verified. [14]

[Endorsed]: Filed August 19, 1952.

[Title of District Court and Cause.]

ANSWER

Defendant Deering-Milliken & Co., Inc., for itself alone and for no other defendant, answers plaintiff's complaint on file herein as follows:

I.

Answering paragraphs II, IV, V, VI, VII, VIII, IX, XIV, XVII, XXII, XXV, XXVI and XXVII thereof, answering defendant has no information or belief sufficient to enable it to answer any of the allegations contained in said paragraphs, and therefore, and placing its denial upon such ground, denies generally and specifically each and every allegation contained in said paragraphs, and in each of them.

II.

Answering paragraphs III, X, XI, XII, XIII, XV, XVI, [15] XVII, XIX, XX, XXI and

XXIV thereof, answering defendant denies generally and specifically each and every allegation contained in said paragraphs, and in each of them.

III.

Answering paragraphs XXIII and XXVIII thereof, answering defendant denies generally and specifically each and every allegation contained in said paragraphs, and in each of them, and particularly denies that plaintiff has been damaged in the sum of Thirteen Thousand One Hundred Seventeen Dollars and Thirty Eight Cents (\$13,117.38) or in the sum of Four Thousand One Hundred Dollars and Sixty Six Cents (\$4,100.66) or in any other sum or amount whatsoever.

Wherefore, answering defendant prays judgment as follows:

1. That plaintiff take nothing by reason of its complaint on file herein;
2. For answering defendant's costs of suit incurred herein; and
3. For such other and further relief as to the Court may seem proper.

ADAMS, DUQUE & HAZELTINE,

/s/ By LAWRENCE T. LYDICK,

Attorneys for Answering Defendant
Deering-Milliken & Co., Inc. [16]

Duly Verified.

Affidavit of Service by Mail attached. [17]

[Endorsed]: Filed October 6, 1952.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER

Defendant Deering-Milliken & Co., Inc., for itself alone and for no other defendant, hereby amends its Answer to plaintiff's Complaint on file herein by adding after paragraph III on page two of said Answer and before the prayer for relief of said Answer the following allegations to its Answer on file herein:

For a Further and Separate Defense to Plaintiff's Alleged Cause of Action, Defendant Alleges:

I.

That, although the alleged contract was for the sale of goods for the price of Five Hundred Dollars (\$500.00) or more, no note or memorandum thereof was ever made in writing, setting forth the essential terms thereof, and subscribed by defendant or [18] its authorized agent; nor did plaintiff accept or receive any part of the goods; nor did the plaintiff at the time pay any part of the purchase money.

For a Second Further and Separate Defense to Plaintiff's Alleged Cause of Action, Defendant Alleges:

I.

That plaintiff did not take reasonable measures to minimize the amount of damages alleged in the Complaint on file herein, to wit: Profits allegedly lost from a contract with the United States, and a penalty allegedly owing by plaintiff to the United

States for having to breach said alleged contract.

II.

That reasonable measures to be taken by plaintiff pursuant to its duty to minimize damages included, amongst other things, the procuring from a supplier other than defendant the goods necessary to perform its alleged contract with the United States, or the purchase from defendant of the goods as offered and the subsequent processing of said goods by plaintiff at a relatively small additional cost.

For a Third Further and Separate Defense to Plaintiff's Alleged Cause of Action, Defendant Alleges:

I.

That the alleged condition precedent to the formation of the alleged contract, to wit: Defendant's ability to "handle the business" after plaintiff's receipt of the alleged Government contract, has never occurred.

ADAMS, DUQUE & HAZELTINE,

/s/ By LAWRENCE T. LYDICK,

Attorneys for Defendant, Deering-
Milliken & Co. Inc.

[19]

[Endorsed]: Lodged November 30, 1953.

[Endorsed]: Filed December 2, 1953.

Mr. Aaron L. Lincoff, April 13, 1954
608 So. Hill St., Los Angeles, Calif.

Mr. Lawrence T. Lydick,
523 W. Sixth St., Los Angeles, Calif.

Re: Modern-Aire of Hollywood, Inc., vs. Deering-Milliken & Co., Inc., et al. Case No. 14,428-T Civil.

Gentlemen:

Please be advised the Court has entered its order this date finding that judgment be entered in favor of the Plaintiff in the above-entitled matter, allowing \$4,421.60 as the amount for loss of profit to the plaintiff and allowing \$4,100.66 as the amount of indebtedness to the United States.

The latter amount (\$4,100.66) shall be set up in the Findings of Fact and Conclusions of Law and Judgment as a trust to be held for the benefit of the United States.

Counsel for plaintiff will please prepare and submit formal Findings of Fact, Conclusions of Law and Judgment pursuant to Local Rule 7.

Very truly yours,

EDMUND L. SMITH, Clerk
By WM. A. WHITE, Deputy Clerk

P.S.—The Court did not file a written decision in this matter. [20]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

Defendant Deering-Milliken & Co., Inc., for itself alone and for no other defendant, files its objections to the proposed findings of fact, conclusions of law and judgment in the above-entitled cause received by it May 10, 1954, as follows:

I. Objections to Proposed Findings of Fact and Conclusions of Law:

A. Defendant objects to the preamble to said Findings of Fact, and particularly the language of page 1, line 32, thereof reading “* * * and the cause submitted for decision” * * * on the ground that said cause was never submitted for decision and that oral reply argument to plaintiff’s closing argument was never allowed to defendant despite approval of the Court and stipulation by plaintiff to such procedure in the within action.

B. Defendant objects to Findings of Fact I through XXIII, inclusive, on the grounds, among others, that said Findings are inconsistent among themselves and one as to the other, and [21] that said Findings, and each of them, are not supported by sufficient evidence, and that said Findings include findings of excessive damages which appear to have been given under the influence of passion or prejudice or as a result of error of law, and that said Findings include findings not properly within the issues of this case and outside the jurisdiction

of this Court, all as hereinafter more particularly set forth.

C. Defendant objects to Findings of Fact II and III on the ground, among others, that said Findings of Fact are not supported by sufficient evidence, the evidence being uncontradicted that at the time mentioned therein there had been no agreement as to subject matter, price, quantity, width, delivery, terms of credit and other terms essential to the creation of a contractual obligation nor any agreement by plaintiff to any of the terms of said alleged contract in writing.

D. Defendant objects to Finding of Fact IV on the ground, among others, that said Finding of Fact is not supported by sufficient evidence, the evidence being uncontradicted that the Memorandum of Order referred to therein was prepared at plaintiff's request for submission to defendant for acceptance or rejection by defendant, makes no reference to any prior agreement and does not confirm any of the language of the documents of March 6, 1952, but in fact on its face sets forth new terms and conditions for consideration by defendant and indicates on its face it is subject to acceptance or rejection by defendant.

E. Defendant objects to Findings of Fact V, VI and VII on the ground, among others, that said Findings are not supported by sufficient evidence, the weight of the evidence being that the estimated cost of manufacture by plaintiff of the items referred to therein was \$64,917.60, the total price which the United States of America promised

under certain circumstances to pay plaintiff therefor was \$69,339.20, and any profit to plaintiff thereunder [22] was by the terms of said contract between plaintiff and the United States of America subject to renegotiation under the laws of said United States of America and, therefore, completely remote and speculative.

F. Defendant objects to Findings of Fact VIII, IX, X and XI on the ground, among others, that said Findings are not supported by sufficient evidence.

G. Defendant objects to Findings of Fact XII and XIII on the ground, among others, that said Findings assume and are based upon findings of fact not supported by sufficient evidence.

H. Defendant objects to Finding of Fact XIV on the ground, among others, that said Finding is not relevant and not material to the issues of the within action.

I. Defendant objects to Finding of Fact XV on the ground, among others, that it is not supported by sufficient evidence.

J. Defendant objects to Findings of Fact XVI and XVII on the grounds, among others, that said Findings are not relevant nor material to any issue in the within action and are not supported by sufficient evidence.

K. Defendant objects to Findings of Fact XIX and XX on the ground, among others, that said Findings are not supported by sufficient evidence, the evidence being uncontradicted that said Lee Piersol had no authority to conclude negotiations

for contracts on behalf of defendant, such action being outside the scope of his authority.

L. Defendant objects to Findings of Fact XXI, XXII and XXIII on the ground, among others, that said Findings are not supported by sufficient evidence.

M. Defendant objects to Conclusions of Law I, II and III on the grounds, among others, that said Conclusions are contrary to law, are not supported by the Findings of Fact and include [23] matters outside the jurisdiction of this Court.

II. Objections to Proposed Judgment:

A. Defendant objects to the proposed Judgment on the grounds, among others, that said Judgment is contrary to law, is not supported by adequate findings of fact and conclusions of law, is outside the jurisdiction of this Court and includes award of damages which appear to have been given under the influence of passion or prejudice or as a result of error of law, and is a judgment made before final submission of the cause for decision. Defendant further objects to said proposed Judgment on the ground it does not conform to the decision of the Court as rendered April 13, 1954.

Respectfully submitted,

ADAMS, DUQUE & HAZELTINE,

/s/ By LAWRENCE T. LYDICK,

Attorneys for Defendant Deering-
Milliken & Co., Inc. [24]

Affidavit of Service by Mail attached. [25]

[Endorsed]: Filed May 11, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Above Entitled Cause came on regularly for trial before the above entitled Court, before the Honorable Ernest A. Tolin, Judge presiding, and trial thereof having commenced on November 20, 1953, and having continued thereafter on November 23, 24, 25 and 30, 1953, and on December 1 and December 2, 1953, before the Court, sitting without a jury, a jury trial having been waived by the respective parties, plaintiff appearing by its attorneys, Gilbert Klein and Aaron L. Lincoff, Esqs., and defendant, Deering-Milliken & Co. Inc., a New York corporation, appearing by its attorneys, Adams, Duque and Hazeltine, by Henry Duque and Lawrence T. Lydiek, Esqs.; and evidence, both oral and documentary, having been introduced and the cause submitted for decision, the [26] Court now makes its Findings of Fact as follows:

I.

The Court finds that the allegations contained in Paragraphs I, III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIV, XV, XVII, XVIII, XIX, XX, XXI, XXIV, XXV and XXVII of plaintiff's Complaint are true.

II.

The Court finds that on or about the 6th day of March, 1952, in the County of Los Angeles, State

of California, a contract in writing was entered into by and between the plaintiff and defendant, under and pursuant to the terms and provisions of which the defendant agreed to manufacture and deliver to the plaintiff 126,000 yards of rayon cartridge cloth, to be manufactured pursuant to military specifications known and designated as PA-PD-29, as amended, and which specifications are in evidence as plaintiff's Exhibit 5.

III.

The Court finds that said contract in writing, made and executed as aforesaid on or about the 6th day of March, 1952, consists of two letters written by the defendant to the plaintiff, which said two letters are in evidence as plaintiff's Exhibits 6 and 7.

IV.

The Court finds that plaintiff's Exhibit 8 in evidence, designated Memorandum of Order, was prepared by the defendant in accordance with the defendant's business custom, practice and usage, and was prepared by the defendant for the purpose of confirming the fact that a contract had been entered into on or about March 6, 1952, by and between the plaintiff and defendant, and for the further purpose of confirming certain terms and conditions contained in the contract made on or about March 6, 1952. [27]

V.

The Court finds that the cost to the plaintiff of manufacturing the inner assembly liners, required

to be manufactured by the plaintiff in accordance with the terms and provisions of its contract with the United States of America, said contract being in evidence as plaintiff's Exhibit 12, was the sum of \$66,304.38.

VI.

The Court finds that the total price which the United States of America promised and agreed to pay to the plaintiff under and pursuant to the terms and provisions of the aforesaid plaintiff's Exhibit 12 in evidence was the sum of \$70,725.98.

VII

The Court finds that under and pursuant to the terms and provisions of the contract by and between the plaintiff and the United States of America, plaintiff's Exhibit 12 in evidence, the plaintiff was entitled to and would have realized a profit of \$4,421.60, and that accordingly the plaintiff has suffered and sustained damages in said amount of \$4,421.60.

VIII.

The Court finds that the plaintiff relied upon the promises, agreements and covenants contained in the aforesaid contract of on or about the 6th day of March, 1952, being plaintiff's Exhibits 6 and 7 in evidence, and that in reliance thereon, plaintiff made and executed the contract with the United States of America, being plaintiff's Exhibit 12 in evidence.

IX.

The Court finds that except for the promises,

agreements and covenants made by the defendant and contained in the contract of on or about March 6, 1952, being plaintiff's Exhibits 6 and 7 in evidence, plaintiff would not have entered into its contract with the United States of America, being the aforesaid plaintiff's Exhibit 12 in evidence. [28]

X.

The Court finds that plaintiff's Exhibits 6 and 7 were written by the defendant for the express and sole purposes of having the plaintiff rely thereon and as an assurance to the United States of America that a binding contract had been entered into on or about March 6, 1952, by and between the plaintiff and defendant, and that said contract was contained in and evidenced by said plaintiff's Exhibits 6 and 7 in evidence.

XI.

The Court finds that when said plaintiff's Exhibits 6 and 7 were written by the defendant, the defendant knew that said exhibits would be shown to the duly authorized representatives of the United States of America and that the United States of America would not have entered into a contract with the plaintiff, plaintiff's Exhibit 12, unless and until the United States of America received said Exhibits 6 and 7.

XII.

The Court finds that at all times during the negotiations by and between the plaintiff and defendant prior to the making of the contract or on

or about March 6, 1952, plaintiff's Exhibits 6 and 7 in evidence, the defendant knew the nature, content and requirements of the military specifications (plaintiff's Exhibit 5 in evidence) pursuant to and in conformity with which the defendant would be required to manufacture the rayon cartridge cloth which it agreed to manufacture and deliver to plaintiff.

XIII.

The Court finds that at all times during the negotiations by and between the plaintiff and defendant prior to the making of the contract of on or about March 6, 1952, plaintiff's Exhibits 6 and 7 in evidence, the defendant knew that the rayon cartridge cloth which it agreed to manufacture and deliver to the plaintiff would not meet certain military specifications, but said defendant [29] nevertheless failed and neglected to advise plaintiff thereof until long after the making of the contract of on or about March 6, 1952.

XIV.

The Court finds that at no time prior to on or about March 6, 1952, did the plaintiff know that said rayon cartridge cloth would not meet the said military specifications, plaintiff's Exhibit 5 in evidence.

XV.

The Court finds that in reliance upon the promises, agreements and covenants contained in plaintiff's Exhibits 6 and 7 in evidence, plaintiff was

caused to and did suffer damages in the sum of \$4,421.60.

XVI.

The Court finds that it is true that on or about the 8th day of June, 1952, the United States of America, by and through its agents, employees and representatives in the Department of the Army, demanded of the plaintiff in writing that the plaintiff pay unto the United States of America the sum of \$4100.66, the amount of bona fide damages sustained by the United States as a result of the breach of the agreement herein sued upon.

XVII.

The Court finds that it is true that except for the breach by the defendant of its contract with the plaintiff, being the contract of on or about March 6, 1952, plaintiff's Exhibits 6 and 7 in evidence, the United States of America would not have made a claim against the plaintiff for payment by it to the United States of America of the sum of \$4100.66.

XVIII.

The Court finds that one Lee Piersol was the regional manager for the defendant, Deering-Milliken & Co. Inc., a New York corporation, the said Lee Piersol having his office in Los Angeles, California.

XIX.

The Court finds that the said Lee Piersol was an employee [30] of the defendant who had been given permission and authority to commence, conduct and

conclude negotiations on behalf of the defendant leading to and for the making of contracts on behalf of the defendant.

XX.

The Court finds that the defendant authorized its employee and regional manager, Lee Piersol, to conduct and conclude all negotiations leading to the contract of on or about March 6, 1952, being plaintiff's Exhibits 6 and 7, and that the said Lee Piersol signed said plaintiff's Exhibits 6 and 7 and made the aforesaid contract for and on behalf of the defendant; and in all of said negotiations and in the making of said contract, the said Lee Piersol acted within the scope of authority given to him by the said defendant.

XXI.

The Court finds that the allegations in Paragraph I of the Further and Separate Defense, as contained in defendant's Amendment to Answer, are untrue.

XXII.

The Court finds that the allegations in Paragraphs I and II of the Second Further and Separate Defense, as contained in defendant's Amendment to Answer, are untrue.

XXIII.

The Court finds that the allegations in Paragraph I of the Third Further and Separate Defense, as contained in defendant's Amendment to Answer, are untrue.

Conclusions of Law

And as Conclusions of Law from the foregoing Findings of Fact, the Court finds as follows:

I.

That the plaintiff, Modern-Aire of Hollywood, Inc., a California corporation, is entitled to a judgment against the [31] defendant, Deering-Milliken & Co. Inc., a New York corporation, for damages in the sum of \$8,522.26, with interest thereon at the rate of seven per cent (7%) per annum from the 25th day of March, 1952, together with its costs and disbursements incurred herein.

II.

That the sum of \$4,100.66, being the amount of the claim and demand made by the United States of America against the plaintiff, is a sum which, if due and owing, is payable by the defendant, and that said amount is a trust fund or trust monies to be held as such by the defendant for the use and benefit of the United States of America.

III.

That by reason of the acts and conduct of the defendant toward the plaintiff, the defendant is estopped to deny that it is liable to the plaintiff in damages in the sum of \$8,522.26.

Dated: May 14th, 1954.

/s/ ERNEST A. TOLIN,

Judge of the U. S. District Court

Disapproved as to form:

ADAMS, DUQUE & HAZELTINE,

/s/ By ROBERT W. DRISCOLL,

Attorneys for Defendant, Deering-Milliken & Co.,
Inc., a New York corporation. [32]

Affidavit of Service by Mail attached. [33]

[Endorsed]: Lodged May 10, 1954.

[Endorsed]: Filed May 17, 1954.

In the United States District Court for the South-
ern District of California, Central Division

No. 14428-T.

MODERN-AIRE OF HOLLYWOOD, INC., a
California corporation, Plaintiff,

vs.

DEERING-MILLIKEN & CO., INC., a New York
corporation, JOHN DOE ONE, JOHN DOE
TWO, RICHARD ROE CORPORATION
ONE and RICHARD ROE CORPORATION
TWO, Defendants.

JUDGMENT

The Above Entitled Cause came on regularly for trial before the above entitled Court, before the Honorable Ernest A. Tolin, Judge presiding, and trial thereof having commenced on November 20, 1953, and having continued thereafter on November 23, 24, 25 and 30, 1953, and on December 1 and

December 2, 1953, before the Court, sitting without a jury, a jury trial having been waived by the respective parties, plaintiff appearing by its attorneys, Gilbert Klein and Aaron L. Lincoff, Esqs., and defendant, Deering-Milliken & Co. Inc., a New York corporation, appearing by its attorneys, Adams, Duque and Hazeltine, by Henry Duque and Lawrence T. Lydick, Esqs.; and evidence, both oral and documentary, having been introduced and the cause submitted for decision, and [34] the Court having filed herein its written Findings of Fact and Conclusions of Law, now, therefore:

It Is Ordered, Adjudged and Decreed that plaintiff, Modern-Aire of Hollywood, Inc., a California corporation, do have and recover of and from the defendant, Deering-Milliken & Co. Inc., a New York corporation, damages in the sum of \$8,522.26, with interest thereon at the rate of seven per cent (7%) per annum from the 25th day of March, 1952.

It Is Further Ordered, Adjudged and Decreed that from said amount the sum of \$4,100.66 be held by the plaintiff as trust monies for the use and benefit of the United States of America and immediately upon receipt by plaintiff be remitted to the United States.

It Is Further Ordered, Adjudged and Decreed That plaintiff Modern-Aire of Hollywood, Inc., a California corporation, do have and recover of and from the defendant, Deering-Milliken and Co., Inc., a New York corporation, its costs and disbursements incurred herein in the sum of \$324.98.

The Clerk is ordered to enter this Judgment.

/s/ ERNEST A. TOLIN,

Judge of the United States District
Court [35]

Affidavit of Service by Mail attached. [36]

[Endorsed]: Judgment docketed and entered
May 18, 1954.

[Endorsed]: Filed May 17, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Deering-Milliken & Co., Inc., a New York corporation, one of the defendants above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 18th day of May, 1954.

Dated: June 17, 1954.

ADAMS, DUQUE & HAZELTINE,

/s/ By JAMES S. CLINE,

Attorneys for Appellant Deering-Milliken & Co.
Inc., a New York corporation. [37]

[Endorsed]: Filed June 17, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

The undersigned, Seaboard Surety Company, a corporation organized and existing under the laws of the State of New York, and duly licensed to transact business in the State of California hereby acknowledges that it is bound to pay to Modern-Aire of Hollywood, Inc., a California corporation, plaintiff, the sum of Ten Thousand Dollars (\$10,000.00).

The condition of this bond is that, whereas Deering-Milliken & Co., Inc., a New York corporation, one of the defendants above named, has appealed to the United States Court of Appeals for the Ninth Circuit by Notice of Appeal filed June 17, 1954, from the judgment of this Court entered May 18, 1954, if said defendant shall pay the amount of the final judgment herein if its appeal shall be dismissed or the judgment affirmed or modified, together with all costs, interest and [38] damages that may be awarded, then this bond is void, otherwise to be and remain in full force and effect, This bond shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 8 of the above entitled Court.

Dated: June 18, 1954.

[Seal] SEABOARD SURETY COMPANY,
/s/ By HOWARD SISKEL,
Attorney-in-Fact

The premium on this bond is \$150.00.

Examined and recommended for approval as provided in Rule 8.

ADAMS, DUQUE & HAZELTINE,
/s/ By JAMES S. CLINE,
Attorneys for Appellant Deering-
Milliken & Co., Inc.

I hereby approve the foregoing. Dated this 18th day of June, 1954.

/s/ ERNEST A. TOLIN, Judge [39]

Notary Public Certificate attached.

[Endorsed]: Filed June 18, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 42, inclusive, contain the original Complaint; Answer; Amendment to Answer; Copy of Letter dated April 13 from Clerk to Counsel; Objections to Findings of Fact, Conclusions of Law and Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Supersedeas Bond; and Designation of Record on Appeal which, together with the original exhibits and

Reporter's Transcript of Proceedings on November 20, 23, 24, 25, 30, December 1 and 2, 1953, in seven volumes, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 12th day of July, A.D. 1954.

[Seal]

EDMUND L. SMITH,

Clerk

/s/ By THEODORE HOCKE,

Chief Deputy

[Title of District Court and Cause.]

MOTION FOR AND ORDER EXTENDING
TIME TO FILE RECORD AND DOCKET
CAUSE IN APPELLATE COURT

Appellant, Deering-Milliken & Co., Inc., a New York corporation, one of the defendants above named, by its attorneys of record and pursuant to Rule 73(g) of the Federal Rules of Civil Procedure, hereby moves the Court for an order extending the time to file the record on appeal and docket the cause in the appellate court to and including the 16th day of August, 1954, upon the ground that the Notice of Appeal was filed on June

17, 1954, that forty (40) days from that date have not yet elapsed, and that because of the following facts, additional time is necessary to properly prepare the record for the appellate court:

Lawrence T. Lydick, an attorney at law and a partner in the firm of attorneys of record for appellant, was, since the inception of the within action, in charge thereof and was the attorney who prepared the same for trial and appeared on behalf of appellant at said trial. Since June 13, 1954 Mr. Lydick has been absent from said firm, having entered the Hospital of the Good Samaritan on said date and undergone surgery on June 14, 1954. Mr. Lydick is presently confined at home under the care of Donald A. Charnock, M.D., and will not be able to return to work until on or about August 1, 1954, and will not be able to engage in any active work until approximately October 1, 1954.

Mr. Lydick is the only attorney in the firm of Adams, Duque & Hazeltine, attorneys of record for defendant-appellant, who is familiar with the facts and circumstances of the within action, and in order that he may properly supervise and direct the appeal of said action, it is necessary that the time within which to file the record and docket the above entitled cause in the appellate court be extended to and including August 16, 1954.

ADAMS, DUQUE & HAZELTINE,

/s/ By JAMES S. CLINE,

Attorneys for Defendant-Appellant

Upon motion of defendant-appellant, good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the above entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including August 16, 1954.

Dated: July 19, 1954.

/s/ ERNEST A. TOLIN, Judge

[Endorsed]: Filed July 19, 1954. Edmund L. Smith, Clerk.

In the United States District Court for the Southern District of California, Central Division

No. 14428-T.

MODERN-AIRE OF HOLLYWOOD, INC., a
California corporation, Plaintiff,

vs.

DEERING-MILLIKEN & CO. INC., a New York
corporation, et al., Defendants.

TRANSCRIPT OF PROCEEDINGS

Los Angeles, California, November 20, 1953

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For the Plaintiff: Aaron L. Lincoff, 3450 Wilshire Blvd., Suite 901, Los Angeles;

and Gilbert Klein, 608 So. Hill St., Room 707, Los Angeles. [1*]

Los Angeles, Friday, Nov. 20, 1953, 10:15 a.m.

The Court: Good morning, counsel. After telling you we would start at 9:45 the court convenes at 10:15.

Now, one of the occasions for that—I could have, of course, said I was busy with the clerk, but I didn't get in, however, until five minutes after 10:00 because we had a jury trial going on here and the jury was out last night and I happen to still be in a convalescent state from an illness of last spring and I have to spend so many hours in bed.

I have a note made apparently at the time this case was set, that it was a one day case. The clerk said something to me yesterday about counsel having mentioned that it would take two or three days.

Mr. Lydick: I think that may be true, your Honor.

The Court: Having acted on the assumption it was a one-day case we have a jury called for Tuesday. I just let you know that. I don't want to deprive you of any time you need. We will take whatever time it requires.

But in these cases the Government pays for the juries in federal court, and we pay them a little better than in the state court, so inasmuch as we have 30 on that panel already ordered to be here Tuesday, we will have to take enough time out from

* Page numbers appearing at top of page of original Reporter's Transcript of Record.

your case Tuesday morning to impanel that jury and then we will order them to return to begin the actual trial [4] at whatever time we can tell by then we will be through with your problem.

Mr. Lydick: Excuse me, your Honor. Could you tell me what the court's prospective Monday schedule is?

The Court: Very indefinite. I will know at the close of the morning recess. We have a matter on in the afternoon that would reasonably be expected to take all day, that is, all afternoon.

Monday is generally reserved for law and motion, but counsel just called and explained that he is about midway through a trial and the judge of the department where he is trying it said, "You have to be here Monday." So they are trying to work that out. There are many attorneys involved and if they still cannot go ahead Monday afternoon we can hear your case.

As to Monday morning, I understand that there are going to be requests to continue most of the matters set for Monday morning, so we might be able to perhaps get a substantial trial day for you.

Now, we have taken the judicial five minutes on those subjects. Do you wish to start proceeding with the case?

Mr. Lincoff: Plaintiff is ready, your Honor.

Mr. Lydick: Defendant is ready, your Honor. I am Lawrence Lydick of the firm of Adams, Duque & Hazeltine.

I wish to make a joint appearance with Mr.

Henry Duque, [5] who intended to be here but is ill with a cold. He intends to be here Monday.

I would like to introduce to the court Harold V. Kennedy, counsel of Deering, Milliken & Co. in New York. Mr. Kennedy is a member of the Bar, of course.

The Court: Good morning, Mr. Kennedy.

Mr. Kennedy: Good morning. Thank you for allowing me to participate and sit at counsel table.

The Court: You may have anyone at the counsel table you feel will be helpful for the case. If you want to move Mr. Kennedy's special admission for this case, all right.

Mr. Lydick: I would like to move the special admission of Mr. Kennedy. I can vouch for his good moral character. I know of my personal knowledge he is a member of the New York State Bar.

The Court: For the purpose of this particular litigation, Mr. Kennedy, you are a member of the Bar with an invitation to you to make whatever comments, objections or motions which the nature of your employment here would indicate to you to be made.

Mr. Kennedy: Thank you very much, your Honor.

Mr. Lincoff: May it please the court, I am Aaron L. Lincoff, and the gentleman seated to my immediate right, in the dark blue suit, is Leonard J. Mills, the president of the plaintiff corporation. The gentleman seated at his right [6] is Gilbert Klein, Esquire, a member of the Bar of California and my associate in this case.

If your Honor please, this is a case in which the plaintiff seeks to recover damages for breach of contract. It is one arising out of these circumstances and facts:

It would appear that sometime prior to on or about December 18, 1951, the plaintiff corporation was approached by the Government with respect to the possibility of its being able to furnish to the Government items of ordnance materiel, which, with the court's permission and for the sake of brevity, we will hereinafter refer to as a liner, that is, a piece of cloth that is used in the manufacture of cartridge shells, whether they be 75 mm or 105 mm, or what, but is manufactured apparently, and insofar as it pertains to this case, appears to be manufactured from rayon cloth.

Negotiations seeking as their end result the consummation of the contract with the United States Government was thereupon commenced. In the course of attempting to ascertain the availability of the material for the manufacture of these liners, as well as the price and circumstances under which they would be obtainable, the evidence will show that Mr. Mills contacted several concerns whose principal business it is and was to furnish this type of cloth. One of them was the defendant in this action, Deering-Milliken & Co., Inc., a New York corporation. That they are such a corporation, [7] organized and doing business in California, is admitted in the pleadings.

It would further appear, your Honor, from time to time quotations were furnished by Deering-Milli-

ken to Mr. Leonard Mills. These were, with almost no exception, save perhaps one exception, furnished by Mr. Lee Piersol, who, in all the correspondence which he signed and submitted to us—by “us” I mean the plaintiff—signed as regional manager. He and he alone, except as I have indicated before, perhaps on one occasion, carried on all the negotiations with Mr. Mills.

It would appear then that the negotiations of a companion sort, that is, the negotiations with the United States Government Ordnance Department, on the one hand, and Deering-Milliken & Co., on the other, were carried on contemporaneously during the course of the negotiations with Deering-Milliken & Co., and from time to time various quotations, as the market indicated, were made, that is, for the price per yard of the goods. And from time to time, also, there was discussion of the various and different widths in which this cloth was to be furnished for subsequent fabrication into these liners.

It would appear, your Honor, that a price of $36\frac{1}{8}$ cents per yard was fixed for cloth of $45\frac{1}{2}$ -inch width. The total contract with the Deering-Milliken & Co., under our theory of the case, resulted in an agreement that [8] Deering-Milliken & Co. would sell to the plaintiff 126,000 yards of this rayon cloth of $45\frac{1}{2}$ -inch width at $36\frac{1}{8}$ cents per yard.

Originally there was a quotation based on two different widths of the same material, but the testimony will indicate, I am satisfied, that for purposes of facility and ease of complying with the Govern-

ment delivery schedule and other Government contractual requirements, it was eventually agreed upon that it would all be one width, and so it was.

The evidence will further show, if your Honor please, that on March 6th Mr. Mills came to Mr. Piersol, after having been to the Army Ordnance Department, and told Mr. Piersol that Modern-Aire of Hollywood, the plaintiff in this case, had a contract with the Government. "They want a letter from you, Deering-Milliken, confirming the fact I have a contract with you."

The evidence will show that on March 6th, on that occasion when Mr. Mills was in the defendant's office here in Los Angeles, a letter was written and signed by Mr. Lee Piersol as regional manager, the language of which starts out, "This will confirm the fact that we have today consummated a contract," and then it went on to describe the goods.

The evidence will further show that on that same day, and perhaps within a few minutes, another letter was written for the purpose of assuring Deering-Milliken it had a contract, [9] the first letter having been written as assurance to the Army Ordnance Department.

The evidence will further show that in Mr. Mills' presence, and prior to writing the letter that was intended to satisfy the Government request, a call was made by Mr. Piersol to the Army Ordnance Office and confirmation of the fact that such a letter was requested and desired by the Government was obtained.

The evidence will then show, your Honor, that

thereafter Deering-Milliken & Co. apparently undertook to begin the manufacture of this goods. The Government contract had required, if your Honor please, that this goods, this cloth be manufactured according to what are known as government specifications PA-PD-29. Those specifications indicate various and sundry things with respect to the standards, specific properties and/or qualities this cloth is required to have. It discusses ether extract, permeability, weave and various and sundry things, all of which I don't profess to have in my mind at the moment, but the specifications will indicate the various breakdowns of the various requirements.

The evidence will further show that every letter, March 6th letters, as well as all letters submitted prior thereto by Deering-Milliken said and quoted and confirmed the fact they were dealing for the manufacture and furnishing of goods according to Specification PA-PD-29.

It will further show, your Honor, and your Honor will [10] hear, I am satisfied, throughout this trial a term called "in the greige." The word "greige," I think, is properly spelled and correctly spelled g-r-e-i-g-e.

The quotations in the letter, with respect to the furnishing of the goods, were without exception in every case, "according to PA-PD-29, in the greige."

The deposition of Mr. Lee Piersol, the regional manager, elicited without qualification that "in the greige" means as the goods come off the loom. It appears then that a written contract confirming the

assurance given by the United States Army Ordnance Department to Mr. Mills, that a contract had been let an informal document was drawn and made effective as of March 14, 1952.

Pursuant to the request of the Deering-Milliken Co. in New York, Mr. Mills tendered and delivered over to Mr. Piersol, in the Los Angeles office, a check by way of a down payment, I believe four thousand five hundred fifty-seven dollars and some-odd cents. That check was accepted and it was delivered to New York. That took place apparently, and I think without question the evidence will show that occurred on or about March 20th.

On March 21st a TWX, known in full language as a teletype message, came from New York from Mr. Lovett, a gentleman who was here at the time of the taking of the deposition of Mr. Mills, addressed to the attention of Mr. Piersol, and [11] that teletype message read as follows:

“Re Modern-Aire Spec Calls For Minimum Porosity of 35 Cubic Feet Per Minute Per Square Foot and a Test Just Completed On Our Greige Cloth Showed 8.5 Porosity Which Does Not Meet Government Specifications in Order to Correct This Would Require Too Long a Time And We Be Unable To Meet Delivery Do Everything Possible To have Customer Accept.”

A demand for performance was made by a representative of the United States Army Ordnance Department upon Deering-Milliken. That was made by a gentleman whom we will produce in this court.

It was made in the form of a telephone call to

one J. C. Harris, a gentleman who is the vice president of Deering-Milliken in New York.

The testimony will be that the Army Ordnance Department, through Mr. Drake, called Mr. Harris and asked Deering-Milliken what it proposed to do about it. And Mr. Harris said, "We don't propose to do anything. It will cost us 3 cents a yard to finish it, in order to have it comply with the specifications, and we aren't interested."

We made an attempt to find out thereafter—this the testimony will show—or, to obtain this goods elsewhere, and aside from the question of apparent inability to meet the delivery schedule which the Government had set forth in its [12] contract, it appeared that it would have cost us at least six or seven thousand dollars over our cost price accepted by the Government, in order to get this goods.

Our total profit was only going to be \$13,000.00. That raises the question of law which I am sure your Honor is immediately aware of, and at the appropriate time we will present our authorities on that.

Suffice to say, your Honor, after demand was made for performance and after Mr. Harris advised the gentleman whom we will produce here as to its reaction, we were then compelled to tell the Government we could not perform according to the contract.

The contract as awarded by the United States Government to Modern-Aire provided that he would be paid \$70,725.98. There is a 2 per cent plus or

minus variation the Government will accept to, that the contract price may vary within that limit.

And the evidence will further show that our cost would have been \$57,608.60. We therefore would have realized a profit of \$13,117.38.

The evidence will show, without mistake, your Honor, that at all times Mr. Piersol knew—he so acknowledges in his deposition—that this was goods that was called for, to be furnished according to the specifications PA-PD-29.

It will also show that at all times—and he so [13] acknowledge again in his deposition—that Mr. Mills told him, “It is urgent. I have a Government contract. I have delivery schedules to meet.”

And it will also appear that Mr. Piersol was aware of the fact that there was a profit to be made.

We have submitted to your Honor our trial memorandum, setting forth the matter of knowledge of a profit is sufficient as the basis for special damages in the form of profit, even though the exact amount may not be known.

The Court: It still is damages within the contemplation of the contracting parties.

Mr. Lincoff: Yes.

The Court: As I understand your theory.

Mr. Lincoff: That is right. It is because it is, as a matter of fact, brought home by way of knowledge or notice to the defendant.

The Court: Prior to the acceptance of the contractual obligation?

Mr. Lincoff: That is correct.

The Court: When I make these comments, counsel, I am not deciding the final question of law. I am merely undertaking to let counsel know that I either understand their theory or misunderstand it. So that I might be corrected if I am not following correctly the thought of counsel.

Mr. Lincoff: What is of equal importance, your Honor, [14] and then this, too, is set forth in our pleadings, an item of special damages, which is this result which flowed from the circumstances as I now relate them to your Honor.

The plaintiff was thereupon confronted with the realization it could not perform under the contract which it had executed with the Government. Demand upon it, by the plaintiff, was made for the performance of the contract. The inability to perform was acknowledged. So the United States Government apparently procured this material elsewhere, and apparently had to pay the sum of \$3,100.66 over and above the contract price that Mr. Mills had been awarded, in order to procure it.

A formal demand was made upon Modern-Aire for the payment of that sum of money. And I want to represent to this court, as an officer of the court, that the matter was then brought to my attention. And I set these facts before the General Accounting Office in Washington.

The Court: General Accounting Office of the Government?

Mr. Lincoff: Yes, of the United States Government. And I was advised by that office, in view of the fact that my letter recited there was litigation

pending in which we were seeking to recover this amount, that at that time the plaintiff would not be put upon a list called "Persons Indebted to the United States."

I bring that to the court's attention so that the court [15] will know the particular status of that at this time. And I don't suggest—because I would not have the power to read the Government's mind—that that means they will not take action. I am satisfied an inquiry will eventually be made as to the status of this claim and this lawsuit, and a demand will be made in accordance with the position the Government has heretofore taken.

The Court: The Government is not a party to this particular litigation.

Mr. Lincoff: That is correct. I brought that out in the pleadings by setting forth this item of damages. This I want to respectfully suggest to the court: If we had had \$4,100.66 to pay, we would have paid the liability and then claimed for it. I represent to this court that if this court finds in favor of the plaintiff, that we would desire that an order be made directing Deering-Milliken to pay the sum of \$4,100.66, not to us, but directly to the United States Government in satisfaction of the claim of Modern-Aire.

In other words, I don't want to leave, by subtlety, implication or otherwise, any thought we might be able to pick up an additional \$4,100.66 unjustly. If your Honor please, we want no part of that money. We feel it is not ours. We are satisfied under the

law clearly it belongs to the Government of the United States.

I respectfully submit that such an order may be made by [16] this court under the pleadings.

So with respect to the specific recovery to the plaintiff, your Honor, actually we are asking only for our loss of profit.

The Court: For your——

Mr. Lincoff: For our loss of profit on the contract. The sum of \$4,100.66, as I say, we are satisfied to have, if the court should find in favor of the plaintiff, to have the court direct the defendants that that sum be paid directly to the Government of the United States in satisfaction of its claim.

The position taken by the defendants first became apparent, your Honor, after the TWX or teletype of March 21, 1952, to which I have already referred. That position then resolved itself into saying that "in the greige" didn't mean as it came off the loom, as the merchandise or cloth came off the loom. It meant as it came off the loom, true, but that it also required further finishing.

The Court: Is that going to call upon us to determine what is meant in the trade by that particular expression or term?

Mr. Lincoff: I think, your Honor, that you may want to know that. I don't think that that testimony is going to be admissible, your Honor, because the contract is specific in that it says—and all the correspondence says—"PA-PD-29, in the greige." [17]

The Court: Then don't we know what is meant by that term?

Mr. Lincoff: That is true, sir.

The Court: What is going to determine the inadmissibility of evidence to explain it?

Mr. Lincoff: Only if your Honor finds that the pleadings, of which there are none on the part of the defendant, I submit, raise either these two questions: A, an ambiguity in documents. That is a specific defense, I am sure your Honor well knows, that must be raised by affirmative pleadings.

And B, the fact that there is a custom and practice in a trade with respect to the interpretation of that phrase. And nothing of that sort appears in the pleadings, your Honor.

We submit, therefore, if your Honor please, that the contract as made is for "in the greige," according to Specifications PA-PD-29.

There is no pleading now, your Honor, as I say, in the defendant's Answer setting forth that there is any ambiguity about that term. And there is testimony which I am sure will be elicited, because it is in the deposition, that at no time did Mr. Piersol ever say anything at all about further finishing to Mr. Mills. And the defendant's position now is that "in the greige" means further finishing, that that is understood in the trade, they say, and everyone who is in the cloth business knows that.

This is something that perhaps I should hold for later, but I believe, and I feel properly compelled to bring it to your Honor's attention, and that is sometime in April some documents were sent out from the Deering-Milliken office in New York for Mr. Mills' signature, something called a sales note,

and there is specified "PA-PD-29, in the greige," and then they have suddenly on that added the words "when finished." That is the first time that we ever saw the phrase "when finished" added to "in the greige."

I respectfully submit this to your Honor for consideration: If in the trade the phrase "in the greige" means when finished, what was the necessity of putting it in the document? I think the case is clear in this respect, and this is the position which the plaintiff takes and will stand on: They simply couldn't meet the specifications, and they acknowledged it in their TWX. And if they didn't think they had a contract with us with respect to that, why they find themselves compelled in their TWX to say, "Do everything possible to have the customer accept"?

Those, I think, are the facts, your Honor. I think in all sincerity and honesty I have fairly stated the position of the plaintiff and the defendant. As the testimony unfolds I am satisfied, if your Honor please, it will bear out what I have stated to your Honor from this platform. We respectfully submit, therefore, your Honor, that judgment should be awarded [19] in favor of the plaintiff, against the defendant, for the sum of \$13,117.38 as and for loss of profits on the contract, and that a judgment should be rendered either ordering the defendant to pay the sum of \$4,100.66 directly to the Government of the United States, in satisfaction of its claim against Deering-Milliken, or if that money be paid to the plaintiff, it be paid to the plaintiff

only on condition in some way he satisfy this court it is immediately being made payable over to the Government of the United States.

The Court: You are actually asking then you be declared a trustee for the Government if that money be awarded to you?

Mr. Lincoff: If the mechanics are so required. I think the simplest thing and it is my suggestion it would be an order against the defendant.

The Court: Do your pleadings justify relief in that form?

Mr. Lincoff: I submit they do, your Honor. Thank you very much.

The Court: Does the defense wish to make a statement now or reserve it?

Mr. Lincoff: I will be happy to make a statement now, your Honor.

The Court: Thank you.

Mr. Lincoff: If your Honor please, I do not intend in this or any other opening statement I may make to any court to attempt to draw a legal or factual conclusion from the evidence. [20] In a jury case perhaps, but in a court trial I do not, because I feel this court will, from the evidence, be able to determine, for example, whether or not the March 6th instruments referred to were intended to be contracts, whether or not the amount of money paid to our company was intended to be a down payment or simply a deposit to insure that these people had money enough to go forward with an agreement if they entered into it. And what the purpose and meaning of the teletype will be. Mr. Lovett will be

in court, from New York, to testify as to the circumstances that led to the sending of that teletype.

I am going to limit myself, therefore, to a discussion of the elementary law principles which we think are applicable to this matter and to some of the background material which will be elicited from the evidence, but because of its special nature perhaps the court would like a review before trial.

The primary issue presented to the court in this action is a combined legal and factual issue of whether or not Deering-Milliken Co. Inc. and Modern-Aire of California, Inc. at any time ever entered into a binding contract for the sale by Deering-Milliken and the purchase by Modern-Aire of 126,000 yards of rayon cloth to be manufactured especially for Modern-Aire by Deering-Milliken.

The plaintiff contends that such a contract existed and was breached. Apparently, the contract is one of March 6, 1952. [21] The defendant contends that such a contract never existed and therefore could not have been breached.

The Court: Are you relying upon a lack of what we used to be told in law school was a meeting of the minds?

Mr. Lydick: Precisely, your Honor. Defendant Deering-Milliken Co. Inc. is a New York corporation with its main offices in New York City and branch sales offices throughout the United States.

For some eighty-eight years it has represented various cotton, woolen and rayon mills located in the Carolinas and in New England as an exclusive sales agent throughout the country. It owns and

operates no mills itself and manufactures no cloth itself.

As a sales agency its methods of operation are fixed and widely known in the trade. Local sales offices, such as that maintained in Los Angeles, have no authority to enter into any agreements and are merely transmitters of information, requests for quotations and orders to the New York office where these requests for quotations are, in turn, referred to the mills where orders, in turn, are referred to the mills and only after——

The Court: Are we going to have to determine an agency question here?

Mr. Lydick: I think if the question is whether or not Mr. Piersol had authority to enter into a contract, either by [22] oral statements or by any writings, very definitely I consider there is an agency question.

Mill quotations are referred through the New York office to local sales offices for transmittal to the prospective purchaser. Quotations, as distinguished from orders, acceptances of orders, are made directly from the New York office to the purchaser and do not go through a local sales office.

Local sales representatives have no authority, either actual or ostensible, to accept any order except for transmittal to New York. The New York office itself has no authority to accept any orders except after approval first obtained from the mill which has agreed to produce the cloth.

To anyone familiar with the textile industry these procedures are obviously necessary, for a given mill

only has so many looms and the scheduling and availability of time of these looms is a very necessary element to the entry into any contract and may be the key to whether or not a mill will accept or reject an order.

Rayon, the subject cloth in this lawsuit, is named as a generic term for manufactured textile fiber or yarn produced chemically from cellulose. After the manufacture of the yarn it must be loomed into cloth.

In order to prevent breakage of the yarn during the looming process there must be placed upon the yarn certain chemicals called weighting material, which strengthens it [23] during the looming process.

The commonly accepted trade term to describe rayon fabric as it comes from the loom, unbleached and unwashed, and containing this weighting material, is greige. The spelling may be either g-r-e-i-g-e or g-r-a-y, interchangeable. This term in the textile industry has no color connotation except as referred to as the undyed yarn in making cloth.

After the rayon goods have been loomed they must be converted or finished for ultimate sale. Bleaching, scouring to remove the weighting material, sizing, dyeing and printing, if that is the use to which it can be put, is all part of the converting and finishing process.

Mills which loom rayon cloth may have one or two types of facilities. They may have facilities which permit them to convert or finish the cloth, or

they may have no such facilities and be merely producers of greige goods.

Some rayon mills not only loom the greige goods, but they convert it and finish it and sell it directly or indirectly to the ultimate manufacturer. Other rayon mills produce only the greige goods and they sell those greige goods either to independent converters or to the ultimate user for the converter. These are to common knowledge in the textile industry. No such knowledge is more common than the fact that Deering-Milliken rayon mills are greige goods mills in the production of every type of material except those used in the garment [24] industry.

There is some debate in the industry itself as to whether or not it is wiser to produce at Burlington or J. P. Stevens or at some of the other mills that do finish goods. Those mills that produce finished goods cite the fact of the extra profit they gain by selling a finished product.

Deering-Milliken, however, cites the advantage in producing only greige goods and not having to guess as to color and style that Miss or Mrs. America or the trade may desire in a particular year, and perhaps in missing the guess of large inventories not readily salable.

Plaintiff Modern-Aire of Hollywood is a California corporation whose assets consist of some leased space slightly larger than this courtroom, a number of sewing machines, a few cutting tables and some other miscellaneous equipment. This prop-

erty was purchased by Leonard Mills and two associates in May of 1951.

Sometime in 1951 Mr. Mills obtained entire control and became president and treasurer of the company, his wife being secretary. Insofar as production of any sort is concerned, the corporation has been completely inactive at all times since Leonard Mills has had any connection with it.

Leonard Mills will testify, if in accord with his deposition, that before the Second World War he was employed in the jewelry business and in the retail furniture business. Since [25] coming out of the Service in 1946 his primary employment has been the war surplus business under the name of L. J. Mills & Company for a short period.

In late 1951 and sometime in the summer of 1952 Mr. Mills sought to obtain a number of contracts from various branches of the Armed Services to produce various and different textile items. Other than the manufacture of a few sample parachutes for parachute flares and an attempt to obtain a government contract for these flares, which never materialized, Mr. Mills has apparently never had any direct or indirect experience in the manufacturing of textile products or any acquaintance with the textile industry. Therein lies perhaps the source of the whole conflict to be presented to this court, for in the textile industry, as in all things, a little knowledge is often worse than none at all.

With this background of the parties and industry they operate or sought to operate, we turn again to the issue presented in the case of Deering-Milli-

ken & Co. and Modern-Aire of Hollywood, that at any time they entered into a binding contract of the sale and purchase of 126,000 yards of rayon cloth.

The evidence, we believe, will show that sometime shortly before Christmas 1951 Leonard Mills asked that that office obtain a quotation for him on nearly half a million yards of natural and unbleached rayon cloth in varying widths which he thought he might require in connection with a government [26] contract he was seeking. He was at that time concerned particularly with the weight of the cloth and indicated he would probably need delivery sometime during March through August.

He informed the local sales office of Deering-Milliken that the cloth he sought a quotation on was described in the specification PA-PD-29 of March 2, 1951. He was advised of Deering-Milliken procedures and his request for a quotation was transmitted to New York by Mr. Piersol of the Los Angeles sales organization.

Upon receipt of the inquiry in New York, it was assigned to Charles Lovett for handling. He, in turn, referred it to Deering-Milliken's fabric development department to contact the mill that manufactured the cloth sought by Mr. Mills.

From fabric development it was determined that Drayton mills in the Carolinas could manufacture greige goods which, when finished, would meet Specification PA-PD-29. Inquiry was made of this mill and in due course the mill advised it would be interested in such an order and authorized a quota-

tion of 34 cents per yard in the greige on the 38-inch width which Mr. Mills has requested.

This quotation was transmitted by New York to Los Angeles January 9, 1952, nearly 12 to 14 days later and was, in turn, relayed to Mr. Mills.

It is now apparent from this beginning there was a complete misunderstanding as to the subject matter of the [27] negotiations that were to follow. Mr. Mills claims he sought quotations only on goods which would, when delivered, meet every detail of Specification PA-PD-29. Deering-Milliken's office in New York rightfully presumed that he, holding himself out as a prospective purchaser of nearly a half a million yards of fabric, knew his specifications sufficiently to know they called for finished goods, and knew the language of his trade sufficiently well to know that goods stated "in the greige" would have to be finished before they could meet that specification, and knew his industry well enough to know that Deering-Milliken only produced and sold greige goods that always had to be finished by the buyer before it could be put to use.

With this inherent misunderstanding practically assuring an ultimate failure to all discussions because of lack of mutual assent, Mr. Mills continued spasmodically, through January, February and early March of 1952, to seek new quotations for new widths, new lengths, new delivery schedules. All quotations given by Deering-Milliken to Mr. Mills were intended to and nearly every case did refer to greige goods which, when finished, would meet Specification PA-PD-29 insofar as the intent

of the quoter was concerned, and all quotations were apparently misunderstood by Mr. Mills to mean that Deering-Milliken could produce greige goods and was quoting on greige goods that would meet specification PA-PD-29 without further finishing, [28] although the specification itself obviously indicated that finished goods were referred to.

During the same time Mr. Mills apparently was pursuing his negotiations with the Ordnance Department officials, to obtain this and other contract from them. One thing, we believe, will seem clear from the evidence. Mr. Mills was definitely giving no one a firm order for 500,000 yards or 100,000 yards or 10 yards of rayon greige goods or finished goods, until he had a signed contract with the Department of the Army.

On March 14, 1952, we believe the evidence will show that Mr. Mills obtained his contract with the Government, and in turn, for the first time, placed a firm order with Deering-Milliken. It was during the processing of this order, for the purpose of determining whether or not it would be accepted or rejected, the processing being both by the New York office of Deering-Milliken and by Mr. Mills, that certain correspondence regarding minimum widths and certain correspondence regarding samples, and the very language of the order itself brought to the attention of the New York office that Mr. Mills had been misinterpreting the quotations they had been making.

On Friday, March 21, 1952, Mr. Piersol, both by telephone and by teletype, called and subsequently

was advised to determine and clarify whether or not such a misunderstanding, which they believed from these matters that had come to their attention in New York, existed; whether or not it did truly exist. [29]

Plaintiff, who apparently was given the teletype itself by Mr. Piersol the day it was received, apparently felt it to be highly important evidence. Mr. Lovett will testify as to the circumstances under which it was written, as to its intended purpose.

One of the principal difficulties which defendant has encountered is to determine what plaintiff's claim is as to when plaintiff's requests for quotations and defendant's response to these requests are supposed to have resulted in an unequivocal order and unequivocal acceptance that is necessary to form a contract.

In its pleading, Paragraph IX, plaintiff contends that, "On March 6, 1952, a contract was made, executed and delivered on the terms and conditions hereinafter set forth."

The alleged terms and conditions of this alleged written contract are set forth in Paragraph XII. Defendant unequivocally denies any intent to contract with Mr. Mills on that or any other date and, further, unequivocally denies the existence of any such instrument as is set forth in those pleadings.

The first firm order of any kind or nature from Mr. Mills to Deering-Milliken mill was transmitted on March 14, 1952, after Mr. Mills had obtained his contract from the Government. This order was never accepted, because, as previously explained,

during the course of the processing of that order Deering-Milliken discovered the complete lack of mutual assent as to [30] what the subject matter of the contract was.

The evidence will also show that during the entire period, March 14th to March 21st, there were extended conversations with Mr. Mills with respect to very essential terms upon which there had to be a meeting of the minds before there could have been any acceptance of that March 14th order.

The extended conversations regarding credit and delivery schedules and packaging and disposition of seconds, as well as terminating conversations concerning the subject matter. In order to have a binding agreement between two parties they must agree upon the same thing in the same sense and there must have been an exchange of offer for an acceptance and the agreement must have been definite and certain. It is plain and apparent these elementary contract principles had not been complied with in this. There being no agreement, there could be no breach by Mr. Mills or by Deering-Milliken.

Aside from the law in these facts, there is little equity in Mr. Mills' claims. His hope of quick profit without great effort in a field he knew nothing about by training and education and experience were, not unexpectedly, not realized. His desire to be indemnified for alleged loss of profits and alleged contingent liability for his breach of contract with the Government overlooks the fact, by taking the goods in the greige from either Deering-Milliken or other sources, they were available, and converting

them at any agreed price for [31] approximately 3 cents a yard or \$3,800.00, he still could have met his government contract and realized by his own figures nearly \$10,000.00 on that \$69,000.00 contract, and avoided all liability, contingent or otherwise, for breach of that contract.

The Court: I gather from your remarks that you contend this controversy involves only legal principles as distinguished from equitable?

Mr. Lydick: In my opinion, yes, your Honor. I find nothing in the pleading that would lead me to believe there is any equitable principle involved.

The Court: No estoppel?

Mr. Lydick: I find them unpleaded. If they are there, fine. I find them unpleased insofar as I find the necessary elements of those estoppels. If they are intended we have denied their existence.

The Court: Simply the question I put: This is nothing except kind of a preview of the feature that is now to be presented?

Mr. Lydick: As we understand it from the pleading and presentation of counsel, this action is based upon a written agreement of March 6, 1952. If we are mistaken with respect to that, why, we would be happy to have it clarified both in the pleading and here orally.

If there is anything else, we wish to amend our Answer to raise the statute of fraud by affirmative defense, raise the [32] mitigation of damages by affirmative defense and other matters which we did not feel essential where a written contract was alleged.

The Court: We started about 20 minutes after 10:00. If you wish a recess, if any party wishes a recess, we will take one. Otherwise, we might make up for our tardy beginning by going right on through until 12:00.

Mr. Lydick: That is agreeable.

Mr. Lincoff: Yes. Very cursory, your Honor, and by way of just a brief rebuttal——

The Court: We are not arguing now.

Mr. Lincoff: No. This is the last scene of the preview, if your Honor please. I think the old concept of meeting of the minds has been somewhat replaced by the concept of objective manifestation, rather than a meeting of the minds.

I think Judge Williston and all the legal writers on the law of contracts now make it clear that the question of the manifestation, intention, rather than a meeting of the minds, is the subject of contracts.

The Court: You mean that a meeting of the minds means something different than it used to way back in common law days?

Mr. Lincoff: In effect, yes, your Honor. Rather than what I understood, it is a question of whether I projected the essentials of a contract to someone, and who in [33] turn understood and said, "Yes, I will accept them."

The Court: Basically, it comes back to the same thing, though, doesn't it?

Mr. Lincoff: I think so, your Honor, except it is now a question of manifesting that intent by some objective conduct or agreement. With that,

your Honor, I would like to call as my first witness Mr. Leonard Mills.

LEONARD J. MILLS

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Your full name?

The Witness: Leonard J. Mills; M-i-l-l-s.

Direct Examination

Q. (By Mr. Lincoff): Where do you live, Mr. Mills?

A. At 9333 Monte Mar Drive, Los Angeles.

Q. For how long a period of time have you lived in Los Angeles County?

A. Since 1945.

The Court: May I just interrupt for a moment?

Mr. Lincoff: Yes, your Honor.

The Court: Some of these cases are tried here with no intention of ever briefing. Counsel want to rely upon arguments and upon whatever notes the court takes.

Other counsel are going to want to brief their cases, or [34] I find a lot of them do, and they intend, when they brief them, to submit a copy of the transcript as well, so the court can pick up its details from there. It makes no difference to me. I will either keep notes as we go along and you can still brief it, if you want to, but if you intend to provide transcript in the course of the submitted period, if you let me know now I will simply not

(Testimony of Leonard J. Mills.)

be taking notes I would take if I were going to rely entirely upon memory.

Mr. Lydick: Do you have any preference at all, Mr. Lincoff?

Mr. Lincoff: I have none. I will be happy—

Mr. Lydick: My purpose would be to have some briefing and submit it upon a shared-in cost transcript.

Mr. Lincoff: Your Honor, may I inquire of my client as to the suggestion which Mr. Lydick just made, that is,—

The Court: Suppose we take a few minutes for conference. I have had much experience here with counsel deciding they would split the cost of transcript, and other counsel would rather rely upon what the court keeps as its own notes. Others would like to pay out for the transcript, but haven't any assurance if they win the litigation it will be taxable as costs.

The court wants to be agreeable to the desires of counsel, so you might take a few minutes to explore it. We will recess for that purpose.

(Short recess taken.) [35]

Mr. Lincoff: If your Honor please, it has been stipulated that a transcript may be prepared, and the cost thereof to be borne equally by the plaintiff and defendant and to be taxed as an item of cost.

The Court: Thank you. Then I will not do as much writing. I will attempt to do as much listening.

For your information, our Monday calendar has been pretty well taken care of. If you want to count

(Testimony of Leonard J. Mills.)

on trial Monday, you can have it. You will have to bear with the fact there will be one or two brief law and motion matters. By and large, you can count on Monday.

Mr. Lincoff: Any hour other than the normal starting hour would your Honor suggest?

The Court: I think we might start at the regular starting hour. You might have to wait a few minutes. There is even a doubt as to that.

Q. (By Mr. Lincoff): I believe my last question was, Mr. Mills, how long have you lived in California. A. Since 1945.

Q. How old are you, Mr. Mills?

A. 40 years.

Q. You live with your wife and family at the residence you have given? A. I do.

Q. What was the extent of your formal education, sir? [36]

A. Three years at the university.

Q. Which university?

A. New York University.

Q. When did you complete that phase of your formal education? A. 1937.

Q. How old are you, sir? A. 40 years old.

Q. Did you engage in any type of business activity subsequent to your having completed your formal education at New York University?

A. I was active with my father in the millinery business in New York City, both manufacturing and retail, while going to school. And then upon his death I was active in the retail millinery busi-

(Testimony of Leonard J. Mills.)

ness that he left, until I came out to the West Coast.

Q. When did you come to the West Coast?

A. In approximately 1940.

Q. Where on the West Coast did you settle at that time? A. Portland, Oregon.

Q. Did you engage in any manner of business activity in Portland?

A. I did. First I was employed by Myron Frank there, and after Myron Frank I was with Westfield's Jewelry Store in Portland, Oregon. [37]

Q. For how long a period of time?

A. For a little over a year, somewhere between a year and a half and two years.

Q. Then what transpired with respect to your business career?

A. Nothing further in the business career at that time. In February of 1942 I enlisted in the Air Forces of the United States Army.

Q. How long did you serve in the United States Army Air Forces?

A. I was in the Service until May of 1946.

Q. After your separation from the service did you engage in any business activity?

A. I organized and operated a company, L. J. Mills & Company—my own company—in buying government surplus commodities, and operated that business until 1949, 1950. I have bought and sold approximately a million dollars' worth of government commodities.

Q. Now, did you at the time you were conduct-

(Testimony of Leonard J. Mills.)

ing L. J. Mills & Company engage in any additional business activities?

A. Oh, there were ventures in purchasing other goods, commodities from concerns outside of the United States Government, Westinghouse Aerosol bombs; other close-out merchandise of various nature.

Q. Subsequent to L. J. Mills & Company, did you engage in any type of business activity? [38]

A. In 1950 or the early part of 1951, somewhere in that period there, I bought an interest in Aircraft Tapered Sheets, which company was actively engaged and still is actively engaged in the fabrication of aircraft parts for the aircraft industry here in Los Angeles. It was Government work of a subcontract nature to the aircraft industry.

Q. For how long a period of time were you engaged and connected with Aircraft Tapered Sheets?

A. I was in that field until I learned at Wright Field that there was a local concern, Modern-Aire of Hollywood, that had secured a contract for the manufacture of parachutes. But that the party owning the company wasn't financially able to carry on with that contract.

Because of that, myself and two other parties, both of whom were interested in Aircraft Tapered Sheets, and Bardwell-McAllister, both contractors for the Government in defense work, bought the company.

It was a shell of a company. It had the physical assets, the plant and sewing machines and such. It

(Testimony of Leonard J. Mills.)

had a financial tax loss carry-forward we planned to take advantage of, and we purchased that company and started to negotiate for a parachute contract with Wright Field.

Q. Did you obtain that parachute contract?

A. No. There were several problems came up.

There were cutbacks in the procurement of parachutes [39] at that time, and we were unable to secure the parachute contract at that moment.

Q. Excuse me. I am sorry.

A. I am through.

Q. What was the continuing nature of your business activity?

A. At approximately that time the Ordnance Office of Pasadena contacted us. They had gotten our name, I believe, through Wright Field as a source for the manufacture of liners for 105 mm and 75 mm shells.

They surveyed the plant and found the facilities were satisfactory, and asked whether I would be interested in manufacturing those liners. I was.

Q. What did you then do with respect to pursuing that inquiry that the Government had made of you?

A. I received a proposal from the Pasadena office of the Ordnance Department to manufacture a quantity of 75 mm shells and 105 mm shells, that is, the liners for those shells.

I made inquiry from several sources for prices on the fabric, which was the major cost in the item. The liners consisted of this rayon fabric as per

(Testimony of Leonard J. Mills.)

Specification PA-PD-29, and threads; that is, the basic material that would be used.

Then labor to be added to it was the only other factor in it.

Q. Did you at any time in the course of obtaining this [40] information have occasion to contact Deering-Milliken, the defendant in this action?

A. Yes, I did.

Q. Approximately when did you first contact Deering-Milliken?

A. Approximately December 18th.

Q. Of what year?

A. On or about December 18th of 1951.

Q. How was that contact established, by telephone or personal call?

A. At first by telephone.

Q. Off the record. Mr. Mills, if you will permit me to finish my question before you commence your answer we will facilitate the job of the court reporter. It is very difficult to take two people talking at the same time.

A. I am sorry.

Q. You say that was by telephone you made that contact?

A. That is right.

Q. With whom did you speak on that first occasion, if you know?

A. I spoke to a party who said he was Mr. Lee Piersol.

Q. Will you relate that conversation that occurred on the telephone, stating what you said and what Mr. Piersol said?

A. I advised Mr. Piersol who I was and told

(Testimony of Leonard J. Mills.)

him that I was negotiating with the Government to manufacture a quantity [41] of liners for 75 mm shells and 105 mm shells, which would require rayon fabric to meet Specification PA-PD-29, in the quantity of approximately a million yards.

I suggested several widths that might be used, and asked him if I might have a quotation on those widths.

Q. What did Mr. Piersol say to you?

A. Mr. Piersol said he would get me a quotation on that and I told him I would appreciate his calling me as soon as he had such figures.

Q. Did you subsequently hear from Mr. Piersol with respect to your initial inquiry?

A. Yes. Mr. Piersol called me and later confirmed by letter the prices and quotations on the fabric I inquired for.

Q. Approximately when was it, to the best of your recollection, Mr. Mills, that Mr. Piersol first contacted you to give you a price quotation?

A. It was shortly after the 18th of December or shortly after I made the inquiry of him.

Q. You say on that occasion you also received a confirmation of the quotation by letter, is that correct, sir?

A. Yes, that is correct.

Mr. Lincoff: Please mark this.

The Clerk: Plaintiff's Exhibit 1 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Lincoff): Mr. Mills, I ask you if

(Testimony of Leonard J. Mills.)

that document which I have handed to you represents the first letter which you received from Mr. Piersol in response to your initial inquiry.

A. I believe it is.

Q. Was it received on or about the date that it bears?

A. Yes, it was, January 10th.

Q. Of what year?

A. 1952.

Q. Do you recall whether you received it through the mail or whether you obtained it by calling at Mr. Piersol's office?

A. I got the information first by a call from Mr. Piersol, and that was a confirmation of the phone call.

Mr. Lincoff: We will offer as Plaintiff's Exhibit first in order in evidence, your Honor, that which has been previously marked as Plaintiff's Exhibit 1 for identification.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 1 was received in evidence.)

Q. (By Mr. Lincoff): Subsequent to the date on which, which that letter bears, did you have any conversation with any representative of Deering-Milliken?

A. Yes, I did.

Q. To the best of your recollection, approximately how [43] long after the date that that letter bears did you have such a conversation?

A. I believe that it was after the approximately 6th of February that—when I received word from the Ordnance Department that I was going to be considered for the contract for 105 mm shells only

(Testimony of Leonard J. Mills.)

and not the 75 mm shells, which contract was just a small portion of the total amount that I was considering.

The Court: May I ask a question concerning this Plaintiff's Exhibit 1? Had you ever heard of the expression "in the greige" before you got this letter, Exhibit 1?

The Witness: Yes, I have heard the expression "in the greige."

The Court: Did it mean anything particular to you as a layman?

The Witness: When I first spoke to Mr. Piersol there was—I gave him the specifications, PA-PD-29. In the specifications there was a list of requirements. One of the requirements was listed under the term "color."

That was the only requirement, where they had a choice of three things. In the color it could be either bleached white, unbleached or natural. All the other requirements were very specific as to what it was.

Mr. Piersol made the inquiry as to the price on the basis of "in the greige," meaning it didn't have to be [44] bleached white or colored. And the term "in the greige" there was referring to the color.

The Court: Had you heard of "in the greige" before your conversation with Mr. Piersol?

The Witness: Yes, sir. In the trade there when people refer to "in the greige"—they mean undyed goods. That was the only thing I understood "in the greige" to mean.

(Testimony of Leonard J. Mills.)

The Court: When you first talked to Mr. Piersol on the telephone and referred to PA-PD-29, did you use the term "in the greige" in the course of that conversation?

The Witness: No, sir. When I first spoke to him I read the requirements—I read the specifications to him and I also read the requirements there, and I pointed out that in the color there was a choice of three, and that the—and in our conversation Mr. Piersol, of course, explained—said that the undyed or natural, unbleached, rather, or natural, would be the least expensive item.

And then he made inquiry of New York and referred to me the price of "in the greige" meaning as to the color.

The Court: Well, is this letter, Exhibit 1, the first time that the specific words "in the greige" came into your communication between you and Mr. Piersol?

The Witness: That is right, sir.

The Court: Thank you. Counsel, you note occasionally the court asks questions. Whenever the court asks questions, [45] all counsel are invited to treat the court's questions as if they were put by an adversary. Hence, you may object as freely as if it were made by your adversary in the litigation.

Sometimes a judge, becoming interested in an ultimate legal problem, overlooks either rules of evidence or thinking of rules of evidence, and overlooks an ultimate question of relevancy and is just

(Testimony of Leonard J. Mills.)

as apt to commit error, in his interest to learn something, as counsel are in their diligence for accuracy. So don't be backward about it.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 2 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Lincoff): I have placed before you, Mr. Mills, a document which has been marked as Plaintiff's Exhibit 2 for identification. Do you recall having received that document?

A. Yes, sir, I do.

Q. And to the best of your recollection did you receive it on or about the date that it bears?

A. Yes, I did.

Q. By referring to that letter, is your recollection refreshed as to whether you had a conversation with Mr. Piersol on or about the date that letter bears?

A. Yes, sir, it does.

Q. Did you have a conversation with Mr. Piersol prior [46] to the receipt of the letter, Exhibit 2 for identification?

A. Yes, I did.

Q. That bears the signature of Henry Kramer, is that correct, sir?

A. That is right, sir.

Mr. Lincoff: Your Honor, I offer Plaintiff's Exhibit No. 2 for identification as Plaintiff's Exhibit 2 in evidence.

The Court: Admitted.

(Testimony of Leonard J. Mills.)

(The document heretofore marked Plaintiff's Exhibit No. 2 was received in evidence.)

Q. (By Mr. Lincoff): Subsequent to the receipt of Plaintiff's Exhibit 2 in evidence, did you have a conversation with any representative of Deering-Milliken? A. Subsequent to that letter?

Q. Yes.

A. I believe the next time I spoke to Deering-Milliken was after I was advised by the Government that on approximately February 6th, that I was to be considered and receive the contract on the—to manufacture the liners for 105 mm shells.

Q. You say this was about when?

A. About the 6th of February.

Q. How did you have that conversation, in person or over the telephone?

A. I first—I believe I first called Mr. Piersol. I then went over to his office and explained to him, and [47] showed him the blueprint and the specifications of the liner for the 105 mm shells and advised him I was to get the contract for that portion of the proposal.

I requested that Mr. Piersol, to get a current price on the quantity of goods that was required for just the 105 mm liners. This was a smaller quantity than for the quantity required for both shells.

Mr. Piersol said he would contact New York and get a current quotation. I showed him the blueprint, pointed out to him how simple it was to make the item. It consisted of two pieces of fabric, one which

(Testimony of Leonard J. Mills.)

was a rectangular shape, to be sewn with a seam down the side (indicating).

The second piece was to be a circle with a small hole in the center, which was to be cut on a clicking machine, such as used in the shoe industry, and that sewn to the rectangular piece that has the seam down the side, and the whole thing turned inside out (indicating).

I was emphasizing this to him because in our conversation just as a matter of interest I was pointing out how simple it was for the item to be made.

Pardon me. We further discussed the specifications. I pointed out to him that in my original inquiry I mentioned two specifications, PA-PD-29 and also PXS-1300. The reason for that was there were two blueprints, one for the 75 mm liner and the other for the 105 mm liner. However, I had [48] copies of both specifications. The requirements on both specifications were identical.

I pointed this out to Mr. Piersol so there would be no confusion in New York. I had asked Mr. Piersol whether he wants to send the specifications to New York, and he said no, it wasn't at all necessary, that the New York office had the copies of all these specifications.

He stressed how Deering-Milliken did millions of dollars in government business, and they had the specifications there and that all they need, all that need be sent back to New York is just the specifi-

(Testimony of Leonard J. Mills.)

cation number, and which he did on all further correspondence, PA-PD-29.

Mr. Lydick: May I have the original question?

The Court: The reporter will read it.

(The following question was read: "How did you have that conversation, in person or over the telephone?")

Q. (By Mr. Lincoff): Did you subsequently receive a letter in which you received quotations of the prices current at that time?

A. I believe I did.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 3 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Q. (By Mr. Lincoff): I will place before you a document marked Plaintiff's Exhibit 3 for identification, previously shown to counsel, and ask you, Mr. Mills, if you received that letter.

A. I did receive the letter, yes.

Q. Did you receive it on or about the date it bears, to the best of your recollection?

A. I believe so.

Q. Do you recall whether you received it by mail or by personal delivery? A. By mail.

Mr. Lincoff: I offer Plaintiff's Exhibit 2 for identification in evidence now.

Mr. Lydick: 2 or 3?

Mr. Lincoff: 3.

The Court: Admitted.

(Testimony of Leonard J. Mills.)

(The document heretofore marked Plaintiff's Exhibit No. 3 was received in evidence.)

Q. (By Mr. Lincoff): Now, Mr. Mills, you referred to specifications which you said you showed to Mr. Piersol on an occasion immediately preceding the receipt of Plaintiff's Exhibit 3. Is that correct?

A. That is right.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 4 for identification. [50]

(The document referred to was marked Plaintiff's Exhibit No. 4 for identification.)

Q. (By Mr. Lincoff): I place before you two documents identified as Plaintiff's Exhibit 4, Mr. Mills, and I ask you to examine those and state whether or not those are the specifications which you showed to Mr. Piersol on the occasion of the conversation in his office.

A. These are the blueprints; not the specifications.

Q. I beg your pardon. I stand corrected. The blueprints to which you referred?

A. That is correct.

Q. You showed both of those to Mr. Piersol, did you?

A. That is correct.

Mr. Lincoff: We will offer Plaintiff's Exhibit 4 for identification in evidence now, if your Honor please.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 4 was received in evidence.)

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lincoff): On the occasion you showed Mr. Piersol the blueprints, which are in evidence as Plaintiff's Exhibit 4, you stated, I believe, that you also showed him specifications, is that correct?

A. That is correct.

Mr. Lincoff: Please mark this.

The Clerk: Plaintiff's Exhibit 5 for identification. [51]

(The document referred to was marked Plaintiff's Exhibit No. 5 for identification.)

Q. (By Mr. Lincoff): I will place before you, Mr. Mills, Plaintiff's Exhibit 5 for identification, which are labeled as follows, on the upper right-hand corner of the document, this exhibit, consisting of three separate sets of specifications, is the designation "PA-PD-29, 2 March 1951, Amendment 1, 7 May 1951," and "PXS-1300, 2 June 1949."

I will ask you to examine those and state whether they are the specifications which you showed to Mr. Piersol on the occasion which you have last referred to?

A. They are.

Mr. Lincoff: I offer these in evidence, if your Honor please, as Plaintiff's Exhibit 5.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 5 was received in evidence.)

Q. (By Mr. Lincoff): Now, Mr. Mills, subsequent to the receipt of the letter dated February 8, 1952, which is Plaintiff's Exhibit 3, did you have

(Testimony of Leonard J. Mills.)

any conversation with any representative of Deering-Milliken?

A. There were several conferences with Mr. Piersol.

Q. When was the first one you had subsequent to the date of February 8, 1952?

A. I don't recall just when and how they took place. [52] But for the period from February 6th until the period of March 6th I was negotiating with the Government in getting the contract drawn up, and at the same time getting delivery dates and such with Mr. Piersol.

My negotiations with the Government were along the lines on price there. I was able to secure a price of—a 10 per cent increase in the price——

Mr. Lydick: Excuse me. Are these presumed to be parts of conversations with Mr. Piersol, or is this testimony in which there was no party present from the Deering-Milliken organization?

The Witness: There was no party present from Deering-Milliken.

Mr. Lydick: I object to that. That evidence would be pure hearsay so far as this party is concerned.

Mr. Lincoff: The objection is well taken. The testimony may go out. I am asking only with respect to conversations you had with representatives of Deering-Milliken.

Q. (By Mr. Lincoff): My question was—I will repeat it—when was the first conversation you had

(Testimony of Leonard J. Mills.)

with a representative of Deering-Milliken subsequent to February 8th?

A. I do not recall when the first conversation took place, but I know that I spoke to him several times.

Q. All right. To the best of your recollection how soon after February 8th did you first speak with him? [53]

A. It is hard for me to place any specific time of any one of the several conversations. It finally consummated to a conversation on the date, which I remember distinctly, of March 6th.

Q. Now, can you state what the general, or if you can't remember dates, can you state what the general subject matter of the conversation was in the conversations which you say you had between February 8th and March 6th?

A. I was keeping Mr. Piersol advised as to the progress I was making on my contract with the Government. And also on delivery schedules, that the mill might be able to follow in getting the goods to me.

I was advising him, for example, I was securing a 90 per cent partial payment clause included in the contract, which was quite an important item.

Q. Anything further as to general subject matter? A. Prior to March 6th?

Q. Yes.

A. Only in several conversations on delivery schedules and such.

Q. Now, you have come to the date March 6,

(Testimony of Leonard J. Mills.)

1952. Did you have a conversation with a representative of Deering-Milliken on or about that date? A. Yes, sir, I did.

Q. Where did the conversation take place? [54]

A. At Mr. Piersol's office.

Q. Who was present?

A. Mr. Piersol was there, for one.

Q. Anyone else?

A. I am not sure.

Q. And you, of course, were there?

A. Yes.

Q. Now, will you relate the conversation that you had with Mr. Piersol on that occasion, stating what you said and what Mr. Piersol said?

A. I told Mr. Piersol that the Government was ready to give me a contract on the liners for the 105 mm shells. They only wanted confirmation from him to the fact that I had entered into a contract with Deering-Milliken to secure the fabric.

Q. What did Mr. Piersol say?

A. Mr. Piersol, after—I had requested at that time, too, that he call Mr. Burns, the representative of the Ordnance Department, and advise him of the fact we had entered into a contract. Mr. Piersol did call Mr. Burns in my presence and advise him of that.

Q. What did he say to Mr. Burns, as you heard him?

A. Mr. Piersol told Mr. Burns that Modern-Aire of Hollywood and Deering-Milliken have entered into a contract, and that Deering-Milliken

(Testimony of Leonard J. Mills.)

would supply the fabric for, the [55] rayon fabric for this contract, as per specifications, and so forth.

Q. All right. Did anything else transpire after the conversation between Mr. Piersol and Mr. Burns?

A. Yes. Mr. Burns, in the conversation Mr. Burns had requested Mr. Piersol for a letter of confirmation, which letter Mr. Piersol then dictated and gave to me.

Mr. Lydick: Excuse me. May we limit it to what you told Mr. Piersol and what Mr. Piersol told you. I object to the latter testimony of what Mr. Burns told Mr. Piersol over the telephone.

Q. (By Mr. Lincoff): Just state what you told Mr. Piersol in the course of your conversation on March 6th.

The Court: After we come to the end of this March 6th conversation we will take a recess, but we will not interrupt hearing this particular evidence.

Q. (By Mr. Lincoff): Just state, Mr. Mills, what you said to Mr. Piersol on the occasion of March 6th?

A. I requested of Mr. Piersol that—I told Mr. Piersol that Mr. Burns and the Ordnance Department wanted confirmation from Deering-Milliken that Modern-Aire of Hollywood had entered into a contract with Deering-Milliken to secure the fabric for this contract.

Q. Then Mr. Piersol made a telephone call?

A. He made the telephone call to Mr. Burns.

(Testimony of Leonard J. Mills.)

Q. What did you hear him say?

A. He told Mr. Burns that Modern-Aire of Hollywood and Deering-Milliken had contracted for the purchase by Modern-Aire of the necessary rayon for this contract.

Q. Then what did Mr. Piersol do?

A. Mr. Piersol then dictated a letter in my presence, to Modern-Aire of Hollywood, advising we had entered into a contract for the purchase of the required goods, and noted on that letter that it was for the information, particularly for the information of the Ordnance Department.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 6 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 6 for identification.)

Q. (By Mr. Lincoff): Mr. Mills, I place before you Plaintiff's Exhibit 6 for identification, and ask you to read it and state whether that was the letter which was dictated in your presence.

A. This is the letter.

Q. Was it signed in your presence by Mr. Piersol? A. Yes, it was.

Q. And it was executed on or about the date it bears? A. That is correct.

Mr. Lincoff: We offer Plaintiff's Exhibit——

Mr. Lydick: Excuse me, Mr. Lincoff. Would you mind [57] telling me, so I will have it clear in my mind, is this the letter that starts out, "We have consummated a contract," or is it the other one?

(Testimony of Leonard J. Mills.)

Mr. Lincoff: I believe it does.

The Witness: It reads—pardon me. It reads, “We understand from our conversation today in this office we have consummated a contract with you.”

Mr. Lydick: I understand which letter it is.

Mr. Lincoff: We will offer Plaintiff’s Exhibit 6 in evidence.

The Court: Admitted.

(The document heretofore marked Plaintiff’s Exhibit No. 6 was received in evidence.)

Mr. Lincoff: Your Honor, March 6th is a two-phase operation, so to speak. If your Honor wants me to complete it, I shall.

The Court: I just don’t want to break the sequence of something that you particularly have in mind.

Mr. Lincoff: Very good, sir.

The Court: However, if this is a distinctly different phase, we ought to be taking our lunch hour.

Mr. Lincoff: I think we can conclude this in about five minutes.

The Court: Go ahead.

Q. (By Mr. Lincoff): Did you on or about that same date [58] receive another letter from Mr. Piersol? A. I did.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff’s Exhibit 7 for identification.

(The document referred to was marked Plaintiff’s Exhibit No. 7 for identification.)

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lincoff): Mr. Mills, I hand you Plaintiff's Exhibit 7 for identification, and ask you to examine it and state whether that is the letter you received from Mr. Piersol? A. It is.

Q. Did you receive it on or about the date that it bears? A. I did.

Q. Do you recall whether that letter was dictated and typed in your presence, or whether you received it through some other way?

A. I believe that it was dictated and typed in my presence.

Q. Did you have a conversation with Mr. Piersol with respect to this letter, Plaintiff's Exhibit 7 for identification?

A. Nothing other than what is in the letter.

Mr. Lincoff: I see. We will offer Plaintiff's Exhibit 7 now, for identification, in evidence. [59]

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 7 was received in evidence.)

The Court: While marking Exhibit 7, may I look at 6?

The Clerk: Yes, sir.

Mr. Lydick: Your Honor please, I couldn't help but overhear that remark. While you are looking at 6, would you mind looking at 7?

The Court: I intended to say, "While you are marking 7, may I look at 6?"

Mr. Lydick: I intended to say, "While you are looking at 6, will you also look at 7?"

Mr. Lincoff: I think this would be an appropri-

(Testimony of Leonard J. Mills.)

ate place, after your Honor has read the document, for our recess.

The Court: You don't want to sit here while I look at the exhibits, I know. If the clerk will give me Exhibit 7 after he has marked it, we will take our recess.

The Clerk: Yes, sir.

The Court: We will recess until 2:00 o'clock.

(Whereupon, at 12:05 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [60]

Afternoon Session, 2:00 p.m.

Mr. Lincoff: If your Honor please, Mr. Klein was delayed by what appears to be an emergency call. He will be here momentarily.

The Court: We didn't recess right at 12:00. We can either proceed——

Mr. Lincoff: Yes. I simply wanted to explain his absence.

LEONARD J. MILLS

called as a witness on behalf of the plaintiff, having ing been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Lincoff): Mr. Mills, what did you do after you obtained the letters of March 6th, Plaintiff's Exhibits 6 and 7?

A. I took the two letters of confirmation over

(Testimony of Leonard J. Mills.)

to Mr. Burns at the Ordnance Office and showed him the letter of confirmation for the Government files, and the letter of confirmation for my own files.

Q. Now, did you subsequently have any communication from or conversation with representatives of Deering-Milliken?

A. A few days later, approximately the 10th of March, I received the advance copy of the Government contract confirming our contract of March 6th, and called Mr. Piersol and told [60] him I had the advance copy of the contract.

Q. What did Mr. Piersol say?

A. Mr. Piersol said he would pass that information on to New York.

Q. Did you then go to Mr. Piersol's office at or about that time? A. I am not sure.

Q. Was there anything else said by Mr. Piersol with respect to any call to a representative of Deering-Milliken?

A. Mr. Piersol did suggest and ask me to call Mr. Smith, the credit manager—the credit man of Deering-Milliken and explain to him the 90 per cent partial payment clause which I had in the Government contract, which call I did make.

Q. Did you speak with someone in New York on the occasion of that call?

A. Yes. I spoke to the party that said he was Mr. Smith, the credit man. I explained to him the 90 per cent partial payment clause I had in the contract, that the Government would give me the entire

(Testimony of Leonard J. Mills.)

amount of the invoice as the goods arrived for each shipment.

On the basis of our conversation he specified that the 10 per cent payment in advance for the last 10 per cent quantity of the goods to be purchased should be made in advance on my contract with Deering-Milliken. [62]

Q. Now, did you subsequently report your conversation to Mr. Piersol?

A. I called Mr. Piersol and passed the information on to him.

Q. What did he say?

A. He said that was fine. And shortly after that, about the 14th of March I received a note, memorandum of sale confirming our contract.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 8 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 8 for identification.)

Q. (By Mr. Lincoff): I place before you, Mr. Mills, Plaintiff's 8 for identification. Is that the document which you refer to as the memorandum of order which you received? A. It is.

Q. About when did you receive it, to the best of your recollection?

A. Approximately the 14th of March.

Q. Did you receive it by mail or did you receive it by a call at Mr. Piersol's office?

A. No, sir, I got it in the mail.

(Testimony of Leonard J. Mills.)

Mr. Lincoff: We will offer that document in evidence as Plaintiff's Exhibit 8.

The Court: Admitted. [63]

(The document heretofore marked Plaintiff's Exhibit No. 8 was received in evidence.)

Q. (By Mr. Lincoff): Subsequent to March 14th did you have any communication from or any conversations with any representative of Deering-Milliken?

A. Not until approximately the 20th of March, when Mr. Piersol called me to say that he got a request from New York asking for a check in the amount of approximately \$4,500.00 in payment of that 10 per cent item.

Q. What did you do?

A. I immediately carried the check over to his office and presented it to him.

Q. Did you have a conversation with him when you went to his office with the check?

A. I gave him the check and he accepted it at the time, that was about all.

Q. Did he say what he was going to do with it?

A. I assumed he was forwarding it to New York.

Q. Did he say that?

A. No—I am not sure at this point.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 9 for identification.

Mr. Lincoff: Also this.

(Testimony of Leonard J. Mills.)

The Clerk: Plaintiff's Exhibit 10 for identification.

(The documents referred to were marked Plaintiff's Exhibits Nos. 9 and 10 for identification.) [64]

The Court: As these exhibits are marked I would like to have them passed up, Mr. White.

The Clerk: Marked for identification?

The Court: Wasn't one just admitted?

The Clerk: Yes, sir. I have that.

Q. (By Mr. Lincoff): I will place before you, Mr. Mills, Exhibit 9 for identification and ask you to state whether or not that is the check that you delivered to Mr. Piersol.

A. This is the check.

Q. Did you deliver it on or about the date it bears?

A. I delivered it on the date that it bears.

Q. You delivered it by taking it personally to Mr. Piersol? A. Yes.

Mr. Lincoff: I ask that Plaintiff's Exhibit 9 be admitted in evidence.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit 9 was received in evidence.)

Q. (By Mr. Lincoff): I will also now place before you, Mr. Mills, a letter which has been marked as Plaintiff's Exhibit 10 for identification, and ask you to examine it before I ask you my next question. A. (Witness complies.)

Q. Did you receive that letter? [65]

(Testimony of Leonard J. Mills.)

A. This is the receipt that I received for the check which I gave Mr. Piersol.

Q. Did he send that to you through the mail or was it prepared in your presence in the office?

A. It was prepared in my presence in the office.

Q. And handed to you—

A. Handed to me.

Q. —about the time you gave him the check?

A. That is correct.

Mr. Lincoff: We offer Plaintiff's Exhibit 10 for identification in evidence.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 10 was received in evidence.)

Q. (By Mr. Lincoff): Did you subsequently, Mr. Mills, have any conversation with a representative of Deering-Milliken?

A. Approximately the 21st of March Mr. Piersol called me and advised me he had just received a TWX from New York advising they had difficulty in meeting the specifications at the mill.

Q. Was that by telephone that you had this conversation? A. Yes.

Q. What did you do at the conclusion of the telephone conversation? [66]

A. I told Mr. Piersol on the phone I was coming over immediately, and I immediately proceeded to his office.

Q. Did you have a conversation with him when you arrived in his office?

A. Yes, I did.

(Testimony of Leonard J. Mills.)

Q. Will you relate the conversation, stating what you said and what he said?

A. Mr. Piersol showed me the TWX and said that it seemed there was something to be—some delay in my getting the shipment, the first shipment of goods in order to meet the specifications. What could possibly be done.

I suggested that I take the TWX over to the Ordnance Department and ask them if there could be some postponement in the initial delivery schedule for the first shipment.

Mr. Piersol also suggested that if that wasn't satisfactory, to see if I could secure enough goods for just that first shipment, so that I could—to proceed on schedule.

Q. Do you recall what the amount of the first shipment was to be?

A. It was approximately 20,000 yards.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 11 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 11 for identification.)

Q. (By Mr. Lincoff): I will place before you what is now [67] designated as Plaintiff's Exhibit 11 for identification, and ask you if that is the document which Mr. Piersol handed you.

A. It is.

Q. On the occasion when you went to his office on the 21st? A. That is correct.

Mr. Lincoff: Your Honor please, with your per-

(Testimony of Leonard J. Mills.)

mission I should like to read this into the record, if I may, sir.

The contents of this teletype:

“Mr Lovett Calling Mr Piersol Re Modern-Aire Spec—“s p e c—”—Calls For Min Porosity—”

Mr. Lydiek: Excuse me. May I just see it, to make sure once again?

Mr. Lincoff: Surely.

Mr. Lydiek: Would you be good enough to read it as it is, because I am not sure you will always interpret their short terms as they should be?

Mr. Lincoff: I will start over, Miss Reporter.

“Mr Lovett Clg Mr Piersol Re Modern Aire Spec Calls For Min Porosity of 35 Cubic Ft Per Min Per Sq Foot and a Test Just Completed On Our Greige Cloth Showed 8.5 Porosity Which Does Not Meet Govt Spec In Order to Correct This Would Require Too Long a Time And We Be Unable To Meet Delivery Do Everything Possible [68] To Have Cust Accept.”

Below that in blue ink appears, “Received Mar 21 1952.”

The Court: Now, Mr. Witness, I know that some of the people in the courtroom apparently are interested in the case and that they are sometimes leaning forward to hear you. The reason we ask counsel to conduct as much as possible of the questioning from the lectern is so that the witnesses will speak out.

I just remind you of the necessity of speaking out with a little more vigor than we are accus-

(Testimony of Leonard J. Mills.)

tomed to using in this courtroom, because it is a large room and it has a somewhat noisy air-conditioning system, and it is a little difficult sometimes for people seated several feet away from the witness stand to hear what the witness is saying.

Speak out to this gentleman, bearing in mind all the other gentlemen in the courtroom wish to hear you.

The Witness: Yes, sir.

Mr. Lincoff: We will offer Plaintiff's Exhibit 11 for identification in evidence at this time, if your Honor please.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 11 was received in evidence.)

Q. (By Mr. Lincoff): What did you do following the conversation you had with Mr. Piersol at which he made these [69] various suggestions to you?

A. I took the TWX from Mr. Piersol and proceeded to Mr. Burns' at the Pasadena Ordnance Office. I showed the TWX to Mr. Burns and asked what could be done at this time. Colonel Heath, I believe, also saw the TWX then.

The question then came up as to how we could possibly proceed without any delay to the Government, as this contract was——

Mr. Lydick: If your Honor please, we are talking about conversations at which no representative of my client, at least, was present. Whether we

(Testimony of Leonard J. Mills.)

bring it out by saying he said and I said, it is still hearsay. I object to it.

Mr. Lincoff: The objection is well taken. The objection is good. The testimony may be stricken.

The Court: So ordered.

The Witness: I proceeded to Pasadena Ordnance Office and showed the TWX to Mr. Burns and to Colonel Heath.

Q. (By Mr. Lincoff): Did you subsequently communicate with Mr. Piersol?

A. I called Mr. Piersol, I believe, the following day or possibly the same day and advised him that the Government wanted the contract to proceed without delay. I also told him what they suggested I do, which I did do.

Q. What did you tell him that they had suggested you do? [70]

A. I told him that they called the Joliet office of the Ordnance Department and inquired of that office for the names of any mills that are supplying that fabric to other suppliers, contractors for the same item.

They secured the name of a Paul Whitin Company, who in turn—whose representative happened to be in Chicago at that particular time. I called this representative in Chicago—

Q. Are you telling—

A. I am telling Mr. Piersol this.

Mr. Lydick: All of this was told to Mr. Piersol?

The Witness: To Mr. Piersol, that is right.

(Testimony of Leonard J. Mills.)

The Court: Including what you told the man in Chicago?

The Witness: That is right. I told Mr. Piersol I called this representative of Paul Whitin Manufacturing Co. in Chicago, and asked him for the approximately 20,000 yards, and whether that could be supplied as quickly as necessary.

I also told Mr. Piersol he advised me he could and gave me the price of that fabric, and that the additional cost to me amounted to \$1,600.00 for just that 20,000 yards.

Q. (By Mr. Lincoff): What did Mr. Piersol say?

A. Mr. Piersol thought that was a possibly fair solution and said he would send the information to New York.

Q. Did you subsequently hear from Mr. Piersol?

A. Yes. Mr. Piersol then called me on the following day, I believe, and he advised me he received an answer from [71] New York.

Q. Did he tell you what the answer was?

A. Yes. He said that New York advised him that the delay wasn't only for this first portion of the goods, as he and I had interpreted the TWX, but it was for the entire amount.

Q. Was anything else said?

A. Well, he also emphasized there was nothing further he could do at this point.

Q. And then what did you do subsequent to that conversation with Mr. Piersol?

A. I then immediately went up to the Pasadena

(Testimony of Leonard J. Mills.)

Ordinance Office and passed the information on to them.

Q. Now, did you subsequently attempt to procure the goods elsewhere? A. Yes, I did.

Q. What did you ascertain with respect to the cost of procuring the goods elsewhere?

A. That the goods would cost me approximately \$10,000.00 additional and there was no assurance as to the time within which I would be able to secure this goods.

I also learned that the Pasadena Ordnance Office was attempting to get their Washington office to enforce, to try to force Deering-Milliken to proceed with the contract.

Mr. Lydick: Now, your Honor,——

Mr. Lincoff: That may be stricken as hearsay. The [72] objection to be made would be well taken.

The Court: So ordered.

Mr. Lydick: If the court please, I beg that the witness be cautioned——

The Court: What was that last?

Mr. Lydick: I have a feeling that perhaps the witness needs to be cautioned with respect to repeating conversations he had out of the presence of our clients or any representative.

The Court: Yes. I gather, sir, you are not particularly accustomed to courtroom procedure.

The Witness: No, sir, I am not.

The Court: The procedure and evidence. We have what lawyers call a hearsay rule. Insofar as that rule is concerned, it is simply that you cannot

(Testimony of Leonard J. Mills.)

tell what the conversations were with parties, except those whom are parties to the suit; that is, you can tell what conversation you had with Mr. Piersol or others in the defendant corporation, but you can't tell what conversations you had with the Army or with people in other places, unless one of the defendant's representatives was also present.

The Witness: I see.

The Court: So just try to avoid bringing that in. And if you are successful in that, it will prevent the attorneys from bobbing up and continually asking that part of your [73] answer be stricken.

The Witness: Yes, sir.

Q. (By Mr. Lincoff): Mr. Mills, did you sign a contract with the Government of the United States? A. I did.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 12 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 12 for identification.)

Q. (By Mr. Lincoff): I hand you a document which is now marked as Plaintiff's Exhibit 12 for identification, and direct your attention to the last page thereof. Is that your signature? Does your signature appear on the last page of the document?

A. It does.

Q. Will you read, please, the manner in which the signature element appears?

A. It reads, "Modern-Aire of Hollywood, Inc. by Leonard J. Mills, President," with my signature under it.

(Testimony of Leonard J. Mills.)

Q. When did you sign that document, to the best of your recollection?

A. It was approximately the 12th, 13th of March.

Q. Were the signatures or signature elements, other than yours, on the document when you signed it?

A. No,—well, there was just the Government signature [74]—no, I don't believe the Government signature—I am not sure now whether there was another signature or not.

Q. When did you, to the best of your recollection, when is it that you yourself signed that?

A. Immediately upon its receipt.

Q. I notice on the face of the document, Mr. Mills, on the front page, designated as a triplicate, did you sign other counterparts of that document?

A. If I may go back to your previous question, on reading the letter of transmittal I do now know when I got the contract it was signed by the Government.

Q. Were there other counterparts of that contract forwarded to you for signature?

A. Yes, there were three copies. This is a triplicate signed—enclosed for your files, a triplicate signed document for your files, is what it reads.

Q. Did you sign the other two?

A. Yes.

Q. And forwarded them to the Government?

A. Yes, I did.

(Testimony of Leonard J. Mills.)

Mr. Lincoff: We offer this in evidence as Plaintiff's Exhibit next in order.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 12 was received in evidence.) [75]

Q. (By Mr. Lincoff): Mr. Mills, did you at any time subsequent to March 21, 1953, receive any demand for the payment of moneys from any agency of the United States Government?

A. Yes, I did.

Q. If you recall, in what form did you receive that demand?

A. It was in the form of a letter.

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's Exhibit 13 for identification and 14 for identification.

(The documents referred to were marked Plaintiff's Exhibits Nos. 13 and 14 for identification.)

Q. (By Mr. Lincoff): I hand you Plaintiff's Exhibit 13 for identification, and ask if this is the document which you received from an agency of the United States Government. A. It is.

Q. When did you receive it, to the best of your recollection, Mr. Mills?

A. Approximately the 8th of July.

Q. And that is the date it bears?

A. Yes, it is.

Mr. Lincoff: We will offer that in evidence as Plaintiff's Exhibit next in order.

The Court: Admitted. [76]

(Testimony of Leonard J. Mills.)

(The document heretofore marked as Plaintiff's Exhibit No. 13 was received in evidence.)

Mr. Lydick: Your Honor please, we have no objection to the admissibility of the letter insofar as it having been a document that is mailed and received by Mr. Mills.

However, I think it and the next document are documents before any interpretation be placed on them by the court, that they require an explanation by the person that wrote them.

If in any way they do require an explanation, I wish the court would keep that in mind at the time it reviews it, as the persons who wrote the letters are not here, as appears in other instances in the case. Words don't always speak exactly what they say. It seems to me the documents as letters are all right, but the contents of them, we consider that there be no evidence of the truth and falsity of the contents with respect to them, without having the people here who wrote them.

The Court: Do you contend they are patently ambiguous?

Mr. Lydick: I had never seen these letters before until five minutes ago. I couldn't tell you what the contents of them are. I know this one generally refers to some claim by the Government, and I think the one coming up is called some sort of notice of termination, because of default.

They appear to be that before the court should give much weight to them, that the persons who

(Testimony of Leonard J. Mills.)

wrote them should explain [77] the circumstances under which they were written.

The Court: Your point then goes to the weight to be accorded, rather than the admissibility?

Mr. Lydick: That is correct, sir.

The Court: I take it as an invitation for the production of other evidence.

Mr. Lydick: If it were a jury matter, I would make a much stronger objection. Under the circumstances I limit my objection merely of bringing it to the court's attention, the possibility that full weight not be given them.

The Court: We don't consider that an objection. That is argument on the weight of the evidence. Objection goes to the admissibility, of course.

The document is admitted. I think I said it was admitted. However, if you are making an objection to the court's seeing it or having it in evidence for study, that would mean the appraisal by the court in the light of all the other evidence and the legally pleaded issues. If it isn't entitled to much weight, we will try not to give it much weight. If it is entitled to a great deal of weight, that is something we have to measure.

Mr. Lydick: We do not object to the admissibility of this first letter in any way. We believe that on its face it appears to be a letter that was sent by someone to Mr. Mills. [78]

Mr. Lincoff: Thank you.

Q. (By Mr. Lincoff): Mr. Mills, prior to receiving Plaintiff's Exhibit 13 in evidence, did you re-

(Testimony of Leonard J. Mills.)

ceive another document in connection with default or alleged default under the contract which you had with the Government? A. I did.

Mr. Lincoff: Please mark this for identification.

The Clerk: 14 for identification.

Q. (By Mr. Lincoff): I will place before you what has been marked as Plaintiff's Exhibit 14 for identification, and ask you to state whether that is the document that you received prior to the receipt of Plaintiff's Exhibit 13? A. It is.

Q. Approximately when did you receive it, to the best of your recollection?

A. On the 2nd of June, 1952.

Mr. Lincoff: We will offer this exhibit as Plaintiff's Exhibit next in order.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 14 was received in evidence.)

Q. (By Mr. Lincoff): Mr. Mills, have you made payment of the sum of \$4,100.66 to the Government of the United States? A. I did not.

Q. Have you ever received delivery of any of the cloths [79] which you ordered from Deering-Milliken? A. I did not.

Mr. Lincoff: You may cross examine.

I beg your pardon, Mr. Lydick. There is one thing counsel reminds me of.

Q. (By Mr. Lincoff): Mr. Mills, did you make a computation of the total cost to you of the production of the liners which were called for in the

(Testimony of Leonard J. Mills.)

contract which you had with the Government of the United States? A. I did.

Q. What was the result of your computation? At what figure did you arrive with respect to the total cost?

A. Approximately \$57,100.00.

Q. The contract which is in evidence contains the figure, of course, which you were to receive from the Government upon performance?

A. That is correct.

Q. Have you received any payment of any moneys from Deering-Milliken?

A. I have not.

Q. You have not received delivery of the merchandise? A. No, I have not.

Mr. Lincoff: You may cross examine. [80]

Cross Examination

Q. (By Mr. Lydick): Mr. Mills, a good deal of this may seem repetitive to you, because it will be covering at times subject matter you just got through discussing with your counsel. I trust you will bear with me if it does seem repetitive, and follow through with the answers.

The Court: Since you have said you are not familiar with courtroom procedure, while your own attorney was questioning you, he was considerably limited by a rule that prohibits the asking of leading questions and so on, except on preliminary matter.

If he asked, "Your name is Jones, is it," that

(Testimony of Leonard J. Mills.)

would be preliminary. For him to say, "You entered into a contract, didn't you," would merely call for you to say yes or no, and the suggestion is carried in the question that you should say yes.

Your own attorney isn't allowed to do that. On cross examination the attorney who is now asking you questions, is adverse to you, he is trying to win a lawsuit against you. Instead of one who is apt to try to lead you into something favorable, if there is any leading, he would lead you into something unfavorable. He has a right to do that.

He can ask you all the leading questions he wants to. That is within the rules of evidence. [81]

The Witness: I see.

The Court: It becomes important, therefore, you understand what he is asking before you answer.

The Witness: I see.

The Court: If you don't understand the question, tell him so, and being a gentleman, he will straighten it out for you.

Then after you know what he is asking, think for a moment so you are giving a considered answer. Just look out if he asks you a leading question, that if you answer yes, that you are answering because yes is the right answer and not just to be accommodating, because you are going to be held to what comes out on cross examination.

The Witness: I see, sir. Thank you.

Q. (By Mr. Lydick): As long as we are on the subject, Mr. Mills, have you ever at any time before been a party to any civil or criminal action, or have

(Testimony of Leonard J. Mills.)

you ever appeared as a witness in any action whatsoever? A. Yes.

Q. How many times? A. Once, I believe.

Q. Where was that?

A. Here in Los Angeles.

Q. You appeared as a witness in that action?

A. I did. [82]

Q. How many times have you had your deposition taken Mr. Mills? A. Once.

Q. No deposition was taken in the other matter?

A. No.

Q. This is not your first courtroom appearance, is it?

A. No, it isn't. But I am not experienced, sir.

The Court: You mean you are not extensively experienced.

The Witness: That is right, sir.

Q. (By Mr. Lydick): Nor I, Mr. Mills. I have never been on the stand. You were discussing your education when your counsel was questioning you, and it seemed to me I lost the chronology somewhere along between your education and the time you worked with your father and your going into the war.

You were born in 1913. Would you tell me when you first went to New York University?

A. About 1933.

Q. I see. You were there for three years?

A. That is right, sir.

Q. That would be 1936 or 1937 when you left there? A. That is right, sir.

(Testimony of Leonard J. Mills.)

Q. Which?

A. Well, there was a year during that time there I was out of school because I had my appendix taken out. It was too late to go back into school in the school year. I [83] took a position with Stock Bros. Ribbon Corporation and was traveling on the road that one year.

Q. You were in school then in 1937?

A. That is correct.

Q. Then you went with your father, did you say?

A. I was always with my father.

Q. In mean in business.

A. In business, that is correct. We were always working together; worried together and enjoyed business together, and so on.

Q. What was that business again?

A. He was manufacturing.

Q. The name of the business?

A. His business?

Q. Yes.

A. Well, manufacturing; it was Equitable Hat Company.

Q. Equitable Hat Company?

A. That is right.

Q. That was located in New York?

A. In New York City. He also had a retail millinery shop. My mother first ran one while he was manufacturing; it was on Fordham Road.

Q. What was the name of that shop?

A. The Rose Millinery Shop on Fordham Road.

(Testimony of Leonard J. Mills.)

He then opened up three more shops and dropped out of the manufacturing [84] business.

Q. You worked in all parts of this hat business?

A. Yes.

Q. You manufactured hats, did you say?

A. Millinery, ladies' hats.

Q. You manufactured ladies' hats?

A. Yes.

Q. What did you do with respect to your duties in the manufacture of ladies' hats?

A. Everything from sweeping, packing, shipping, selling, office work.

Q. How old were you at the time you first started in?

A. As far back as I can remember; even maybe as young as 13 part time.

Q. I am speaking more of your full-time participation after you graduated from the university.

A. While I was going to the university, there was only the first year I went to the university during the day, and the last two years I went to the university was at night.

Q. Did you have any law training while you were at the university?

A. No.

Q. Have you had any since that time?

A. No, I did not.

Q. Tell me then, Mr. Mills, where did you go after you [85] left your father?

A. I didn't leave my father.

Q. Well, your father's business and your employment there was terminated for some reason.

(Testimony of Leonard J. Mills.)

A. My father passed on. I stayed on in the business with my mother.

Q. How long did that last?

A. Until approximately 1940.

Q. At that time you——

A. I moved to Oregon.

Q. Portland, Oregon? A. That is right.

Q. Was your father's business continued during the period you and your mother alone were there?

A. The retail business? Yes, we were running it.

Q. No. I mean the Equitable Hat Company.

A. No. He went out of that business when he opened up the additional millinery stores.

Q. I see. Exactly what period of time after you left New York University were you with your father in the manufacturing of hats, at any time?

A. No, I believe he went out of the manufacturing business—I am not at all sure of the year.

Q. Is it a fair statement to say——

A. When I left the university. [86]

Q. ——after you left the university you at no time engaged in any business involving the manufacturing of hats, but it was simply the retail part of it? A. That is correct.

Q. I misunderstood your original testimony. What other experience have you had in textile industry, other than this connection with your father and mother?

A. The first experience I had in the textile industry was when I took over Modern-Aire of Holly-

(Testimony of Leonard J. Mills.)

wood and started negotiating on Government contracts.

Q. I understand Modern-Aire of Hollywood has never manufactured any quantity of textile products of any kind or nature.

A. On the contrary, they were in business for several years; I don't know how long.

Q. I mean since you took it over.

A. Since I took it over, no.

Q. Since you have had a connection with Modern-Aire of Hollywood they have never manufactured anything of a textile nature, or anything else?

A. After the Deering-Milliken incident we did.

Q. You did? A. Yes.

Q. What did you manufacture after that?

A. Ladies' sportswear. [87]

Q. Didn't you tell me at the time of your deposition that the company had been inactive since May or June of 1952?

Mr. Lincoff: I will object, if your Honor please, on the ground this is not the proper method of impeachment. I think it is not proper to summarize the deposition.

If my understanding of the law is correct, the question should be read and the answer given as it appears in the deposition.

Mr. Lydick: I will be very happy to do so.

The Court: If there is impeachment, that is true. I took it from the question that it was rather asking for clarification, rather than undertaking to impeach.

(Testimony of Leonard J. Mills.)

Counsel can be guided by those comments, whether he is going to impeach or ask for clarification.

Q. (By Mr. Lydick): Do you have any recollection of any testimony at the time of your deposition regarding the activities of Modern-Aire of Hollywood since May or June of 1952?

A. I am not sure. If you are referring to that particular period, there was a period of three months in which another party and I manufactured ladies' sportswear.

Q. When was that period?

A. Approximately September, October, November, maybe part of December of 1952.

Q. We will return to your deposition later. We can go on now. [88]

Other than this, have you had any experience whatsoever in the textile industry? This experience you had with ladies' sportswear was subsequent to your dealings with Deering-Milliken?

A. That is correct.

Q. Have you ever had any other experience in the textile industry prior to your dealing with Deering-Milliken?

A. Not in fabricating textiles. I have bought and sold textiles.

Q. What textiles did you buy and sell, Mr. Mills?

A. Cotton goods, government surplus, yardages.

Q. Will you explain what you did in that con-

(Testimony of Leonard J. Mills.)

nection, from whom you bought them and to whom you sold them?

A. Yes. For example, I purchased a large quantity of cotton goods from the Government. On part of that I had it on a contract basis, manufactured into handkerchiefs. This was in 1946 or early '47.

Q. When did you come out of the Armed Services, Mr. Mills?

A. May of '46. The balance of the goods I sold off as it was.

Q. Any other experience? I take it when you purchased this goods from the Government, why, it was not directly from the manufacturer in any way.

A. No. [89]

Q. It was simply a government surplus transaction? A. That is right.

Q. Any other?

A. Yes. There was burlap I purchased and sold.

Q. Where did you purchase that?

A. From the Government.

Q. To whom did you sell that?

A. To various sources of—

Q. Another surplus purchase and sale?

A. No. They were manufacturers of burlap bags, furniture manufacturers.

Q. This was another part of your surplus business, I mean, L. J. Mills & Company, your surplus business? A. That is correct.

Q. Any other textile experience?

A. I don't recall any prior to Deering-Milliken incident.

(Testimony of Leonard J. Mills.)

Q. Can you tell me——

A. May I correct that? There was the negotiation and seeking of the government contract on parachutes, of course, which did require going into nylon and nylon cloth for the parachutes, and getting prices on it, getting types of nylon that was required for different types of chutes, and such as that.

Q. Did you purchase any cloth on that contract? [90]

A. Just enough for some chutes that were required.

Q. That contract was not completed?

A. There was no contract. The contract was never let.

Q. You never got the contract from the Government? A. That is correct.

Q. Now, tell me a little bit about Modern-Aire itself. When did you first come into the company?

A. I believe it was sometime the early part of 1951.

Q. Was it an active company at that time, manufacturing anything?

Mr. Lincoff: Your Honor please, at this time I wish to object on the ground, although this may be within the scope of direct examination, I respectfully submit it is on a completely immaterial matter. I think it is of no moment what the conditions were under which parties became stockholders or officers or directors of a corporation.

There is no denying in the pleadings this was a

(Testimony of Leonard J. Mills.)

validly formed corporation and existed as such. That isn't denied in the pleadings.

For the matter of breach of contract, I think it is wholly immaterial with respect to these matters into which Mr. Lydick is now inquiring.

The Court: I gathered from the opening statements that the familiarity of this witness with the business procedures in the particular type of business might be relevant. This [91] question seems to be a preliminary question as to inquiry in that field. The particular objection is overruled.

Mr. Lydick: I don't intend to inquire at all into the stock ownership of these things. I don't even remember my own last question now.

(The question was read.)

Q. (By Mr. Lydick): I didn't mean actively in a stock sense. Was the company manufacturing anything when you took it over?

A. No, it wasn't.

Q. As I recall, you obtained complete control of the company when?

A. Sometime in the middle of 1951.

Q. Would you say that was June or July of 1951, or during the time you were dealing——

A. Possibly, possibly September of 1951.

Q. September of 1951. In other words, then in essence this I will point out is leading to you. Of course, at all times you had dealings with Deering-Milliken you were the sole operator of Modern-Aire of Hollywood, Inc.?

A. That is correct.

(Testimony of Leonard J. Mills.)

Q. What was the average employment at Modern-Aire of Hollywood, Inc., during the period December 1951 to June 1952?

Mr. Lincoff: Objected to, if your Honor please, as [92] incompetent, irrelevant and immaterial, and not within any of the issues of this case.

The Court: Overruled.

Mr. Lydick: I didn't hear the ruling, your Honor.

The Court: Overruled.

Q. (By Mr. Lydick): Would you like the question? A. Yes, please.

(The question was read.)

The Witness: December of 1951 to June of 1952?

Q. (By Mr. Lydick): Yes.

A. I was the only one in Modern-Aire of Hollywood, except at the time that I received the government contract and I had hired a foreman, who was with me for several weeks setting the plant up.

Q. What time did you hire him?

A. Approximately March of 1952.

Q. Was it before or after the time that the executed contract with the Government was signed?

A. It was at the time the executed contract——

Q. At the time? A. That is right.

Q. He had not been employed by you before?

A. He was employed for the purpose of the contract.

Q. I see. But he had not been employed by you before that time? [93]

A. No; he wasn't, no.

Q. So he hadn't assisted you, for example, in

(Testimony of Leonard J. Mills.)

the review of the various specifications if there had been such a review? A. No.

Q. My recollection of your testimony is that someone from the United States Government contacted you late in 1951, to ask you if you would be interested in manufacturing certain textile items for the Government, is that correct?

A. That is correct.

Q. Do you have any recollection as to who that was? A. No, I don't.

Q. Do you have any recollection as to where the contract was made?

A. I believe it was possibly by mail.

Q. You believe it was possibly by mail?

A. Yes, I believe it was by mail.

Q. They were writing to you or Modern-Aire of Hollywood?

A. They were writing to Modern-Aire of Hollywood.

Q. Possibly as a result of the former manufacturing——

A. As a result of my negotiation they got my name from Wright Field, as a result of my negotiations with Wright Field to get a parachute contract. Either Wright Field referred my name to them as a source or they asked for it, [94] I am not sure.

Q. I don't remember your testimony with respect to your Wright Field negotiations. What were those negotiations?

A. We were trying to get a parachute contract from Wright Field.

(Testimony of Leonard J. Mills.)

Q. "We," meaning Modern-Aire of Hollywood?

A. Yes. To manufacture parachutes.

Q. It was not obtained?

A. No, it was not.

Q. What were these items they contacted you late in 1951 regarding? What did they want you to manufacture?

A. Liners for 75 and 105 mm shells.

Q. That was the only item?

A. That was the only item under discussion.

Q. Were there any items that they subsequently contacted you about?

A. No, because we were negotiating on that particular item.

Q. Were there any items they contacted you about before, other than the parachutes?

A. The Ordnance Department? No, they didn't. There was some conversation later that asked whether I could make flare chutes for them. That was while I already had the contract on—or was negotiating on the contract for the liners. [95]

Q. When were you attempting to or did you ever attempt to get a contract for surgical drapes from the Government?

A. Yes, I did.

Q. Did you obtain that contract?

A. No.

Q. Have you ever manufactured any technical items for the Government, other than samples?

A. No, I did not.

Q. Had Modern-Aire of Hollywood, if you know?

A. Not while I had it, other than samples.

(Testimony of Leonard J. Mills.)

Q. Now, with respect to these interliners they contacted you about, what did they want you to manufacture? A. Liners for——

Q. What are they, Mr. Mills?

A. 105 mm shells and 75 mm shells have a liner inside which, I understand, holds the powder of the shell. I am not aware just what the composition of the shell is or what part this liner plays in it.

They gave us a blueprint which was very simple and self-explanatory, as to just what it was. It was called the liner for the 105 mm shell; I assume it holds the powder in the shell.

Q. I see. How many did they want when they first contacted you?

A. There was possibly two million—I have forgotten [96] exactly what the exact figure of the 75 mm shell was. And approximately half a million of the 105 mm shells.

Q. When was it they contacted you?

A. Prior to the 18th of December, 1951.

Q. That contact was by letter?

A. The initial contact to me was by letter. I then called on them.

Q. Do you have that letter with you?

A. No, I have not.

Q. Is it part of your files?

A. I don't know whether I saved it or not. It wasn't an important letter.

Q. But you believe that the quantity was around two and a half million of the total amount?

A. I am not sure. It may have been 1,700,000 of

(Testimony of Leonard J. Mills.)

the 75 mm shells. It was approximately 469,000, if my figure is correct, of the 105 mm shell, which was the portion that was awarded to me. I think that is the correct figure on the 105 mm shell.

Q. You don't recall what the other amount was?

A. It may have been 1,700,000, to the best of my recollection.

Q. The time of your first contact with Deering-Milliken Los Angeles sales office, Mr. Mills, what were you thinking of, the total of the liners or just the 105 mm? [97]

A. The total amount of the liners.

Q. Had you at that time had any discussions with the Government, other than this letter to you regarding that production?

A. I am not quite sure I understand your question.

Q. Well, I am not quite sure it was an understandable question. Prior to the time you came to Deering-Milliken, had you had any conferences regarding the production of these 105 mm and 75 mm liners with the United States Government officials?

A. Yes.

Q. Where were those?

A. At the Pasadena Ordnance Office.

Q. I see. And had you had any discussions with them at that time, that is, prior to the first time you came to Deering-Milliken, with respect to the quantity of cloth you would need to fill that total order?

(Testimony of Leonard J. Mills.)

A. No. That was something that we figured out, what would be required.

Q. Had you, prior to the time you first came to Deering-Milliken, figured out the total amount of cloth you would need? A. Yes, we did.

Q. How much cloth did you figure you would need?

A. Approximately a half-million yards. [98]

Q. How did you come to that figure?

A. Very simple. Both liners are the same except for the size. The body of the liner consists of a rectangular piece of cloth. I have forgotten the dimensions. If I had the blueprint I could refresh my memory as to what it was.

Those pieces are cut from, easily cut from the length of cloth as you spread it on the table. The layout of that particular piece would be laid out in such a fashion—that was why we consulted different widths and consulted on different widths to figure the most economical width to use, so there would be little waste as possible.

We may have one or two widths this way or a width that way, or straight up and down in another width (indicating).

There may be enough pieces left at the top to put through the clicking machine, where the circular piece would be cut out. There was no difficulty in figuring out how much material was required.

Q. You had done all of this figuring out before you first came to Deering-Milliken?

(Testimony of Leonard J. Mills.)

A. I had an engineer with me consulting on the cost and the figuring, also.

Q. That was prior to the time you first came to Deering-Milliken?

A. It was at the time I first came to Deering-Milliken. In other words, about that same time.

Q. Do you recall what quantity of cloth you asked Deering-Milliken for and in what widths?

A. I asked them for varying quantities in different widths, depending on which width I was considering at the first time.

Q. I mean your first contract, Mr. Mills.

A. I don't recall which width it was, offhand.

Q. Do you have any recollection inquiring with respect to 55-inch width? A. I possibly did.

Q. Do you have any recollection inquiring with respect to 39-inch width? A. I possibly did.

Q. If you had inquired with respect to 55 and 39-inch widths, those would have been the widths that would have, from your decision and your engineer's, been the best to cut to determine the most you could get out of the cloth, is that right?

A. No. Our inquiry only brought forth a price which, in turn, would determine the cost of the fabric. The total cost of the fabric is the number of units you would get out of that width, which would determine whether it was the economical width to use.

Q. That is what I am merely saying, was that your inquiry was for a specific width, which was

(Testimony of Leonard J. Mills.)

the width you had [100] figured out was the most economical to use, is that right?

A. Yes, but my inquiry didn't mean I had decided that was the width. I first had to find out the price and cost of that width, before I decided whether that was an economical width.

Q. That is very difficult for me to follow. Let me see if I do understand it. You have to know what the price of a piece of cloth is before you can determine whether or not you can economically cut more specific sized items out of that piece of cloth?

A. You can cut a certain number of items, units, out of a particular width of cloth.

Q. Yes.

A. The price of that cloth will determine how much those units are going to cost.

Q. Surely.

A. If a narrow width is a certain price and you can only get so many units out of it, it may be more economical to go to the wider width, which would give you a larger portion at a larger price, but the relationship may not make it economical to use the wider width or that particular width.

We found that there were—after several, playing around with several different widths we finally came down to the two widths which we asked for, before the final change on widths. [101]

I am sorry if it is confusing, the way I am putting it.

Q. What you are saying is you finally came down to the two widths which you contracted for

(Testimony of Leonard J. Mills.)

by the March 6th letter, but that is not what you contracted for on March 14th.

A. It finally came down to the two widths I contracted for in either March 6th letters.

Q. That isn't what you wanted eventually?

Mr. Lincoff: Objected to, if your Honor please. I think that is improper cross examination, to ask the witness to specifically limit his answer to what the question calls for. I believe he should be cautioned he would have a right to explain whatever answer he gives——

Mr. Lydick: Surely.

Mr. Lincoff: ——if it is one that calls for an explanation.

Mr. Lydick: I am sure he understands he can explain. I want an answer to my question first.

The Court: Just answer the question. Then if you feel that the short form of answer that is called for in the question is unintelligible without explanation, you may explain it.

The Witness: Will you repeat the question, please?

(The question was read.)

The Witness: No, it isn't. But the reason for the final change was that I felt it would be more efficient, [102] instead of getting these partial shipments every two weeks, of a portion of one width and a portion of another width, to take it all in one width, even though there was a small difference in cost to me.

So I asked Mr. Piersol at the time if it could be

(Testimony of Leonard J. Mills.)

all in one of the two widths originally contracted for, and he said yes, it was perfectly all right.

Q. (By Mr. Lydick): Now, was this contract with the Government, was there to be what is known as a bid contract or some other kind? Were you bidding on it with other people?

A. No. This was a negotiated contract.

Q. Will you explain what that means?

A. A negotiated contract is a form of contract where the Government doesn't call for a sealed bid necessarily. They will sit down and negotiate with you and discuss your costs, and other factors of the contract, and arrive at a decision as to whether you are to have the contract, in other words. It is not like a sealed bid in the sense of a sealed bid would interpret.

In other words, your bid is in, the envelopes are opened and you have no chance to change. Here it was negotiated.

I received the contract on one price. I went back to them at that time—it was not for the entire amount—and said I should have a higher price because it was only for a small portion. They gave me a 10 per cent increase. That is [103] what a negotiated contract is.

Q. When did you receive your first contract?

A. The first notice that I was to be considered for the contract was on February 6th, approximately.

Q. Do you have that notice with you?

(Testimony of Leonard J. Mills.)

A. I got it by phone. I was told, and I immediately passed the information on to Mr. Piersol.

Q. For the larger quantity?

A. No, that was for the small quantity. That was for the four hundred sixty some odd thousand units of the 105 mm shells.

Q. You say you had a previous contract to that, that called for a different price?

A. No. We were originally negotiating and I was figuring my cost on the entire quantity of both the 75 mm and the 105 mm.

They then advised me they would give me the 105 mm. I advised Mr. Piersol of that. At the same time I kept on negotiating with the Government and got a 10 per cent increase in my original price for that, for just the 105 mm shell.

Q. You mean the original price you had been negotiating about? A. That is right.

Q. You hadn't had a previous contract?

A. No, it was a price—— [104]

Q. You had just been negotiating about one price and now you were negotiating about a smaller amount. You negotiated and got a higher price, is that right? A. That is correct.

Q. There wasn't a first contract and then a second contract? A. No, sir.

Q. The only contract you ever had with the Government is the one dated March 14th, is that right? A. That is correct.

Q. As long as we are on that particular con-

(Testimony of Leonard J. Mills.)

tract, when did you say, again, you executed that contract?

A. Immediately upon receipt—you mean by that the final contract?

Q. Signed.

A. Immediately upon the receipt of it, which was approximately the 12th of March.

Q. I recall your testimony that you received three copies of that contract and had not yet been signed by the Government, and you signed it and returned it to them, and they signed it and then sent you a copy?

A. I believe it was signed by the Government when I received it.

Q. You say it was signed by the Government when you got it? [105]

A. I believe so. The letter of transmittal seemed to imply it was.

Q. I see. That is the only reason you believe that, is from the letter of transmittal?

A. To the best of my recollection. I can't recall, other than the fact the letter of transmittal speaks of it as signed contracts.

Q. It wouldn't surprise you at all to find out, however, that the Government insisted that the civilian sign the contract and then mail it back to them, that what they meant in that covering letter by "triplicate" was this was just the third copy they were sending you? A. Well,—

Mr. Lincoff: Just a moment. I object to that, if your Honor please, on the ground the question is

(Testimony of Leonard J. Mills.)

argumentative and assumes facts not in evidence; incompetent, irrelevant and immaterial.

The Court: Sustained. It doesn't make any difference if he was surprised by a particular development or not.

Are you contending there was not such a contract?

Mr. Lydick: No, I am not contending there wasn't such a contract. I am contending that Mr. Mills' recollection of the circumstances under which it was signed are nearly diametrically opposed to those of the persons at the Pasadena Ordnance Department. [106]

I am trying to find out if he thinks he signed it first or they signed it first. I think his recollection on the signing of this contract is important, because if his recollection is faulty about the signing of the contract, it may be faulty as to other things.

The Court: Then you may explore into that and treat the ruling as a ruling upon the particular question which was asked.

Mr. Lydick: Yes, your Honor.

Q. (By Mr. Lydick): Do you think the Government signed the contract before they sent it to you? A. At this point I am not sure.

Q. What did the contract call for you to provide?

Mr. Lincoff: Objected to, if your Honor please, on the ground that the document is the best evidence and speaks for itself.

(Testimony of Leonard J. Mills.)

Mr. Lydick: I have no objection to his looking at the document.

Mr. Lincoff: I think the document being in evidence can be read. In the absence of the best evidence it could be explained, but otherwise you are asking for hearsay.

The Court: You are urging the best evidence rule?

Mr. Lincoff: I am urging the best evidence rule, yes.

The Court: Sustained.

Q. (By Mr. Lydick): You do recall at the time of the [107] contract of March 14th—did you read it before you signed it? A. Yes.

Q. All the terms of it?

A. I believe so.

Q. I notice in your Complaint you include a prayer for 2 per cent over and above the amount of the contract itself on the theory that the contract provides that you may produce 2 per cent more or less than the specific amount, is that correct? A. That is correct.

Q. Had you intended to produce 2 per cent more? A. If at all possible, yes.

Q. You did? A. Yes.

The Court: Whether you would be able to do so would be dependent upon many variable factors.

The Witness: Yes; I could explain that if you wish.

The Court: Do so.

The Witness: All right, sir. The Government

(Testimony of Leonard J. Mills.)

allows you 2 per cent more or less for this reason: You order a quantity of goods. When you get this goods there is a certain percentage in the contract with your supplier which allows them for imperfections and such that you can't use.

If you order just the exact amount of goods you need for the contract you may suddenly find you haven't got enough [108] goods to complete the contract. Therefore, the Government allows you to order more goods than you figure you will need, so that any imperfections there may be, any loss of cloth there may be, would reduce you to some point, but not make it impossible for you to at least supply the minimum quantity the Government would want.

So they give you 2 per cent plus or minus. When we figured the amount of yardage we wanted for the units we figured 2 per cent plus.

We ordered sufficient goods to cover the maximum, so that if there was a certain amount of imperfection we weren't able to use, we felt there would be very little of it we couldn't use, because of the fact we would use the waste pieces wherever possible for the clicking machine, for the circular parts. We would then have something less than that 2 per cent maximum, but it would be as small as possible. I hope I made myself clear.

The Court: Well, you mentioned one variable factor which comes down, as I understand it, to a recognition that performance should be deemed within limits. If it is used up, then the nearest prac-

(Testimony of Leonard J. Mills.)

licable amount of material which the manufacturer would have to acquire in order to process.

Q. (By Mr. Lydick): Well, to get back to my question before the explanation. I believe your answer was that you did deliberately intend to produce 2 per cent over the total [109] amount if you could. You ordered material with it in mind, to produce 2 per cent over the amount ordered?

A. Yes.

Q. Did you read the contract terms with respect to variation in quantity? A. Yes.

Q. Do you have any objection if I read it, and if you want to explain anything you can.

“Variation in Quantity: Variations in quantity plus or minus 2 per cent will be accepted by the Government, subject to the provisions of General Provision 4 hereof, entitled ‘Variation in Quantity.’”

Provision 4 reads: “Variation in Quantity. No variation in the quantity of any item called for by this contract will be accepted unless such variation has been caused by conditions of loading, shipping, or packing, or allowances in manufacturing processes, and then only to the extent, if any, specified elsewhere in this contract.”

Would you say that conditions had been caused by manufacturing processes or variations in loading, packing, et cetera, if in fact you had deliberately ordered enough goods so you could produce the extra 2 per cent?

A. Yes, sir. Because in order to make sure, to

(Testimony of Leonard J. Mills.)

insure the delivery of the minimum quantity, I ordered sufficient [110] goods to cover the maximum number so that if there were that much imperfection, which would reduce my quantity, it wouldn't reduce or there would be less chance of reducing it below the minimum. That is the point.

Q. Were those part of your negotiations with the Government, that you should do that?

A. That is right. They were willing to accept——

Q. Those computations were worked out very carefully? A. Yes.

Q. Do you have your computation papers with you?

A. I believe that Mr. Lydick has them.

Mr. Lydick: If I do——

Mr. Lincoff: You mean Mr. Lincoff.

The Witness: I am sorry. Mr. Lincoff.

Mr. Lincoff: I have here, Mr. Lydick,—I am sorry.

Mr. Lydick: Do you have the papers he used in computing these things with the Government?

The Court: Do you think you might wish to predicate some questions upon the contents of those papers? We have been now almost an hour and a half. We will take a short recess. When you are ready to resume, give the clerk a signal.

(Short recess taken.)

The Court: Counsel, with regard to Monday, you wanted to know what the prospects were here and whether you should count on regular court hours.

We have two or three things on at 10:00 o'clock

(Testimony of Leonard J. Mills.)

that have been continued from week to week, and it was the assurance of counsel they were working them out and we wouldn't have to pass on the issue.

However, I read up on them and we do have to pass on them. They are the sort of thing that would take me 20 minutes, since each one of the three has been with us for a long time, going over from week to week, and last Monday I didn't have more than 10 minutes law and motion work. And I am assuming that we can start out with only taking enough time to either continue them again or approve the adjustments counsel have made.

We have at 11:00 o'clock a matter which, if it were to be presented, would take an hour. But I understand from the attorneys for both parties neither one is ready. So I assume we won't have to take a break at 11:00 for that.

At 2:00 o'clock, Mr. Clerk, you haven't heard about this, Laskowitz vs. Marie-Designer—that is a pretrial—and that pretrial will take a couple of hours. Mr. Mason just called to say he can't be here and we will put it over a week. And it is so ordered.

However, it will be at 3:00 instead of at 2:00 because we have something else at 2:00.

Now, you see what the prospects are for Monday. You might get held up for a few minutes. If so, the likelihood [112] is we can get in a full day.

Mr. Lydick: Would the court suggest we be here at 9:45?

The Court: I suggest you be here at 10:00.

Mr. Lydick: At 10:00 o'clock?

(Testimony of Leonard J. Mills.)

The Court: Yes.

Mr. Lydick: Thank you, sir.

The Court: I hope the court will have had a good night and get here by 10:00 o'clock, too. When you have to spend 12 hours in bed, if you happen to go to a movie or something on Sunday night you don't get up in time to get here promptly at 10:00.

Mr. Lydick: I knew the court's hours, your Honor, but I just heard you were extending them.

The Court: I extend them during the day after I get here. In view of doing that I have to have a certain number of inactive hours. Sometimes you don't feel like going to bed right at 7:30, so it holds you up a little in the morning. You will just have to bear with the infirmities of those——

Mr. Lydick: I assure you there is no objection to a short working day in the court. I will go ahead, if your Honor please.

We were discussing whether or not any of the figures were available that had been used in negotiating the contract with the Government. During the recess it was pointed out to me there were some figures available, but that those were some compilations which had been made perhaps, well, at least since the difficulty between Deering-Milliken and Modern-Aire, or at least since the filing of the action.

Q. (By Mr. Lydick): Do you have any papers or documents of any sort by which you submitted your cost figures to the Government and worked with them on? Any of your cost figures or papers you worked with at that time?

(Testimony of Leonard J. Mills.)

A. The papers I submitted to the Government, they are in the government files. I don't know of any supplemental papers to those that I can lay my hands on.

Q. You have none of your own work sheets or anything like that which you used in making up those papers?

A. No, other than the sheets which I showed you.

Q. That has been made up since your difficulties with Deering-Milliken? A. Yes.

Q. The item that was to be manufactured by you—first, I take it your negotiations then covered a period of approximately from the middle of December to the middle of March, is that correct, about three months?

A. The Government gave me the—on December 18th, gave me the proposal to figure on. I submitted those figures on, I believe, January 21st.

I received word that the figures on the 105 mm shell would be accepted on approximately February 6th. The negotiations [114] ran from that point on.

Q. In other words, from about December 18th to March 14th, around March 14 when you signed the contract, about three months?

A. That is correct.

Q. The item to be manufactured at all times was to be from rayon cloth, is that correct?

A. That is correct.

Q. And you did receive some specifications and blueprints from the Government?

(Testimony of Leonard J. Mills.)

A. That is right.

Q. When did you receive those?

A. Oh, approximately the 18th of December.

Q. Did you review them at that time?

A. The specifications and the blueprints?

Q. Yes. A. Yes.

Q. Did you understand them?

A. As much as necessary, yes, sir.

Q. Taking them one by one, did you understand PA-PD-29?

A. In that I understood—yes, I understood they were the specifications with which I had to order from the supplier.

Q. Did you review them?

A. Only to reading them over. [115]

Q. You did read them over?

A. Yes, I did.

Q. Was there anything in there that seemed unfamiliar to you at all?

Q. Yes, there were a number of things that were unfamiliar.

Q. Did you seek any advice with respect to those unfamiliar things? A. No, I did not.

Q. Did this engineer working with you go over them with you? A. Yes.

Q. Did he understand that?

A. If he did I did not know of that. It was of no concern of ours. Those were specifications we were to use in ordering the fabric. We would order the fabric as per Specification PA-PD-29, which is the common procedure in government contracts.

(Testimony of Leonard J. Mills.)

Q. I understand that is your position. I am merely trying to find out whether you or anyone in your employ at any time ever attempted to work out or learn any of the matters in PA-PD-29 which you may not have understood yourself.

A. No.

Q. You never did? A. No. [116]

Q. Did you study the blueprints?

A. Yes.

Q. Did you understand those? A. Yes.

Q. You worked those all out?

A. Yes, I did.

Q. How about any other specifications, were there any other specifications that were handed to you with respect to this contract?

A. No other specifications that were handed to me. I did secure other specifications on the threads, for example, which when I ordered the threads and got prices on threads, I ordered them as per specification.

I didn't have to cite anything about the specification. I mean the thread people know just what I was talking about, the terminology of the thread.

Q. Do you have the thread specifications with you? A. No, I do not.

Q. You don't have them in your possession?

A. I am not sure. I am not sure whether I still have them; they are common specifications.

Q. How about the packing specifications?

A. Yes, sir.

Q. Did you review those?

(Testimony of Leonard J. Mills.)

A. Yes, sir, I did. [117]

Q. Do you have those with you?

A. No, I have not.

Q. Did you completely understand those?

A. Yes, they were very simple.

Q. But you don't have them?

A. No, I do not.

Q. How does it happen you kept the specifications for the cloth but not for the thread and for the packaging?

A. Because that is the subject of some dispute here.

Q. The rest of your files you destroyed?

A. I did not destroy them, no.

Q. Did you ever have these specifications for the thread and packaging?

A. Yes, I did. I may still have them. If I haven't got them, I could secure them in very short order. They are common things. You could pick them up most any place in any thread house.

Q. Your counsel and I had a mutual understanding that all papers we had in our files and all papers which you had in your files would be available to you.

A. I would be glad to supply those specifications.

Q. No, I want to just know if you have those in your file.

A. To speak the honest truth I would be guessing, to say they are there, because I don't have any further use for [118] them.

(Testimony of Leonard J. Mills.)

Q. Do you have all your files?

A. I believe that we may need——

Q. Do you have files other than these here?

A. Yes, I do have files other than these.

Q. Regarding this matter?

A. I don't know of anything that we may need here.

Q. It is difficult for you to tell what I might need, that is true. A. I am sorry, sir.

Q. Do you have any other files, any other papers, documents of any kind or nature whatsoever, other than those here in court today?

A. I do not know.

Q. You do not know?

The Court: You mean you sized up your case and brought what you thought you needed?

The Witness: That is right.

The Court: You didn't explore to see what things you felt in your own mind might not be necessary to your case were in the group of papers brought to court?

The Witness: I did not destroy anything. I do not know of anything I left out. I did leave out the specifications on the thread, your Honor. I did not think there would be any question on that. I left out the specifications on packing [119] because I didn't think there would be any question on that.

The Court: Do you know where to look to obtain them in a short period of time?

The Witness: Yes, I do.

The Court: Do you wish him to bring them in?

(Testimony of Leonard J. Mills.)

Mr. Lydick: Monday, please. Any other papers or documents, such as working sheets that you may have used in negotiating with the Government, I would appreciate your trying to locate them.

The Witness: Yes.

The Court: Bring them with you when you come Monday. If you wish to go to other subjects, you may reserve the further cross examination on those subjects until he has had an opportunity to look them up.

Mr. Lincoff: May I address the court in response to the statement that Mr. Lydick had made that we did have such an agreement? I have all the files that were turned over to me by counsel. They are and have been ready and available for Mr. Lydick at any time he wishes to see them.

Mr. Lydick: I fully understand.

The Court: No one has suggested any absence of good faith.

Mr. Lydick: Absolutely not.

The Witness: Your Honor, since the blueprints are here [120] in court as evidence, the specifications on the thread and the blueprints, I would have to get the specifications from them, if I may.

Q. (By Mr. Lydick): You understand I don't want you to go out and get me the thread specification from some outside source, or the packing specification from an outside source.

I just want you to bring your files into court, to see if they are there, or if for some reason you don't have them any more.

(Testimony of Leonard J. Mills.)

A. I don't think I have the specifications on the thread or packing.

Q. Once we determine you don't have those I can go ahead and ask you about those.

A. I can safely say I don't have the specifications on the thread and packing.

Q. Why did you not keep those but kept the cloth specifications?

A. Because the specifications on the thread and packing were of no importance, in my opinion, in this matter.

Q. Because they didn't involve a lawsuit, you mean?

A. That is right, sir.

Q. About this specification with respect to stitching seams and stitches, do you have those?

A. No, I do not.

Q. Did you read those when you got them? [121]

A. Yes.

Q. Did you understand those?

A. Yes, I did.

Q. When did you first learn you would have to have a pilot lot of these cartridge liners?

A. Sometime between the 10th of March—after the 6th of March, I will safely say, and the 20th, 21st of March.

The Court: Did you use the expression "pilot lot"?

Mr. Lydick: Yet, pilot lot.

The Court: P-i-l-o-t?

Mr. Lydick: A sample lot, as you might—

(Testimony of Leonard J. Mills.)

The Court: You might have it defined by the witness.

Q. (By Mr. Lydick): Will you explain what a pilot lot is?

A. Yes, sir. The Government—Colonel Heath, in particular, of the Ordnance Department called upon me, after I was advised that the contract was confirmed, that the Government was giving me the contract, and advised me that they would require a pilot lot of a hundred units of this particular liner, which would—they wished to send back to Joliet for an analysis and such. It was a routine matter, as he explained it; that was what was meant by a pilot lot.

Q. This was sometime after March 16th and before March 20th? A. March 6th.

Q. March 6th, I mean, and March 20th when you first [122] learned you would need a pilot lot?

A. It was between March 6th and March 10th he first required it.

Q. What arrangement did you make for the production of that pilot lot?

A. I called Mr. Piersol and asked him if he could supply me with approximately 50 yards of the rayon fabric we contracted for.

Q. That is, to get the fabric?

A. That is correct.

Q. What other arrangements did you make?

A. The thread was available. That was the only arrangements that were necessary.

Q. Did you hire any employees to make them?

(Testimony of Leonard J. Mills.)

A. No, no. We could have picked an operator in no time at all, when the fabric arrived, and could have made the whole thing in an hour or two.

Q. You could have made the hundred in an hour or two?

A. Approximately. Maybe three hours or so. Considerably less than the entire day.

Q. With one operator? A. That is right.

Q. Had you ever made any of them?

A. I never received the fabric, sir.

Q. Had you ever made any of these inner liners at any [123] time?

A. No, sir, I did not.

Q. Mr. Mills, when was your first contact with any representative of Deering-Milliken?

A. Approximately the 18th of December.

Q. Who was that that you contacted?

A. I called Deering-Milliken on the phone and the party answered, introduced himself as Mr. Piersol.

Q. What did you say to him?

A. I told him that the Ordnance Department was interested in having me, and I was figuring——

Q. Speak up a little, please.

A. Yes. I told him that I was figuring for the Ordnance Department in Pasadena on the cost for making liners for 105 mm shells, which required a rayon cartridge cloth.

Q. When you said you were figuring, did you represent to him you were from the Ordnance Department? A. No.

(Testimony of Leonard J. Mills.)

Q. Did you tell him who you were?

A. Yes. I introduced myself as Mr. Mills of Modern-Aire of Hollywood. I asked him for quotations on rayon cloth per Specification PA-PD-29.

Q. Is that all?

A. No. I mentioned to him several widths I could use.

Q. Do you recall those widths? [124]

A. No, I don't at the moment.

Q. Is that all?

A. He said he would inquire of New York.

Q. Is that all you said?

A. I believe that is all I said.

Q. What did he say?

A. He would inquire of New York, get the quotations on those, on that price. I did ask him, read to him the specifications, the requirements in the Specification PA-PD-29.

Q. You did?

A. Yes, I did. And he advised me that New York had the specifications and that they would know just what it was.

Q. But you did read them to him?

A. Yes, I mentioned to him, I read the various terms there, the various requirements in the specifications.

Mr. Lydick: May I approach the witness, your Honor.

The Court: Yes.

Q. (By Mr. Lydick): Would you mind reading

(Testimony of Leonard J. Mills.)

from that what you read to Mr. Piersol (indicating)?

A. Paragraph 3. "Requirements. 3.1 Material.—Rayon cartridge cloth shall be woven from viscose rayon yarn containing no acetyl groups and not more than 0.2 per cent of sulphur.

"3.2 Color.—Unbleached, natural or bleached white. [125]

"3.3 Appearance.—Uniform and free from visible imperfections.

"3.4 Widths.—As specified by the contract, minimum 36 inches.

"3.5 Weight.—5.00 to 5.75 ounces per square yard.

"3.6 Breaking Strength.—Warp direction, minimum 70 pounds, maximum 140 pounds. Fill direction, minimum 70 pounds, maximum 140 pounds.

"3.7 Ether Extract.—Maximum, 1.0 per cent.

"3.8 Acidity or Alkalinity.—Mineral, none. Organic, maximum 0.10 per cent."

Q. May I interrupt just one second?

A. Yes.

Q. These are the things you read to Mr. Piersol over the telephone?

A. That is correct.

Q. This first day?

A. That is correct.

The Court: May I ask a question? Did you tell him the substance of what you have just read, or did you read it word for word?

The Witness: No, sir. The way I read it to him, in order for him to know just what to inquire for, I said, "It is as per Specification PA-PD-29." I

(Testimony of Leonard J. Mills.)

said, "The requirements in [126] there mention the material, the color."

I don't think that I read them as thoroughly as this, because he said it wasn't necessary to, they knew exactly what it was back there.

I did mention the fact that the color could be unbleached, natural or bleached white.

Q. (By Mr. Lydick): Then you don't believe you read all of these things you just read?

A. I read as much of it as he was interested in hearing. He said they had the information back in New York.

Q. What do you remember now?

The Court: Let's try something here. We will see how skillful you are. Just suppose you were a phonograph record, taking down a recording, and the cutting needle was in now and you are going to tell us what he said, when he said to you, "We have that information here," or whatever it was he said that caused you to stop reading the specification.

The Witness: Sir, I didn't say I stopped reading. I am sorry, your Honor. I said——

The Court: Well, just be a phonograph now and say, "I said" and "he said," and tell us as near as you can what you said and what he said so we will hear it as if we had been there eavesdropping.

The Witness: All right, your Honor. I will try to do that. I said, "Mr. Piersol, I would like to get quotations [127] on rayon cartridge cloth as per Specification PA-PD-29 and also PXS-1300." The

(Testimony of Leonard J. Mills.)

requirements of both specifications are identical right down the list there.

I said, "I would like to point out to you certain things in there." I said, "The material is rayon cartridge cloth and woven from viscose yarn. The color can be either unbleached, natural or bleached white. The appearance is uniform and free from visible imperfections. The width is as specified by the contract."

Q. (By Mr. Lydick): Maybe Mr. Piersol could get that. I didn't.

A. He may not. I skipped over a lot of this, which he said——

Q. When he interrupted you to tell you to skip over something, will you tell us what that was?

A. It is difficult for me to recall just what the emphasis——

The Court: We are not giving you an easy question.

The Witness: I know, sir.

The Court: I don't expect that you will try to handle it as if you thought we thought it was an easy question. You just sit there and take your time with it.

We all have to realize that the first illustration I gave you of the phonograph record is an impossibility here. You are not a phonograph record. The human memory doesn't work [128] that way.

You just give it as near as you can and take your time. We will not rush you. We will get as near an approach to the ultimate desirable by your con-

(Testimony of Leonard J. Mills.)

centrating on it and giving us your best answer, and not trying to speed up on it.

The Witness: All right, your Honor. I believe this is the way it went: I read, "Material.—Rayon cartridge cloth shall be woven from viscose rayon yarn containing no acetyl groups and not more than 0.2 per cent of sulphur. Color.—"

Q. (By Mr. Lydick): Just a second. Are you sure you read that to Mr. Piersol?

A. I believe I read that first one to him, yes.

"Color.—Unbleached, natural or bleached white." I am positive I read that to him.

I am not sure—I don't think I read the appearance or the width. The weight I did emphasize to him is to be 5 to 5¾ ounces per square yard. That was definitely mentioned.

I mentioned the warp and fill to have a minimum of 70 pounds and maximum of 140 pounds of breaking strength.

I don't think I mentioned anything else. That was just about, possibly that was all I did mention.

Q. Did you by any chance——

The Court: Could you tell by his break-ins, of what he said and at what point, about when, and all that, or whatever it was he did say—— [129]

The Witness: I asked him whether New York would want a copy of these specifications, and he said no two or three times. He repeated that and said no, they had the specifications in New York. That they did several millions of dollars worth of business with the Government and they were fully

(Testimony of Leonard J. Mills.)

aware of what these specifications are and could get them when they wanted them.

Q. (By Mr. Lydick): So then he didn't interrupt you at all while you were reading from the specifications, it was only when you asked him if he wanted a copy of them?

A. I mentioned the material once, which pertained to the physical points, that I felt he should know. For example, the weight being 5 to 5 $\frac{3}{4}$ ounces.

Q. The ones you felt were material.

A. Yes, I mentioned those.

Q. Did you happen to read to him Specification 3.11?

A. No, I did not. I don't believe I did.

Q. Do you mind reading it to the court?

A. "Workmanship.—The finished cloth shall be uniformly and closely woven and shall be free from weighting materials. A plain single weave is satisfactory, but other weaves may be employed."

Q. You read that yourself?

A. I read the entire thing myself.

Q. What did "finished cloth" mean to you?

A. I didn't draw a conclusion from it.

Q. What did "free from weighting materials" mean to you?

A. I don't know what that means.

Q. I see. But you did make a reference to the unbleached and natural, and you did make a reference to the weight, is that correct?

A. That is correct.

(Testimony of Leonard J. Mills.)

Q. Did you tell him what width you wanted a quotation on?

A. Yes. I asked for several widths.

Q. You don't recall what those were?

A. Not at that particular moment. There was 39 inches for one, I believe, and what else there was I don't recall.

Q. Do you happen to recollect how much you wanted, the quantity?

A. Yes. Each width—no, at that time we spoke of a half a million yards, approximately. I asked him for prices in the various widths.

Q. You think it was a half a million yards or something approximately like that?

A. That is right.

Q. No specific lengths?

A. No specific lengths. I asked prices for the various widths, so I could determine what widths I could use.

Q. You are sure of that? [131]

A. That is correct.

Q. Did Mr. Piersol give you a quotation right away over the telephone? A. No.

Q. What did he say?

A. He said he would consult New York and inquire of New York as to a quotation.

Q. Did he say anything more about why he was doing to consult New York?

A. Other than the fact he had to get a price from the mill.

Q. I see. You understood he was going to con-

(Testimony of Leonard J. Mills.)

sult New York because he had to get a price from the mill? A. That is correct.

Q. Had you had any previous dealings with Deering-Milliken?

A. Nothing that I—I believe I inquired of them previously on prices on various nylon cloths in my parachutes and such.

Q. What did you know about Deering-Milliken, if anything?

A. Only they were a very large national concern, one of the biggest.

Q. Did you understand——

A. One of the biggest. [132]

Q. Did you have any knowledge what position they occupied in the industry with respect to selling? A. A leading position.

Q. Did you understand whether or not they—did you have any impressions as to whether they manufactured cloth themselves or only acted as sales agents?

A. I don't believe that I understood what their inner setup was. No, I do not.

Q. Had you inquired of anyone?

A. No, I did not think it necessary.

Q. You know a man by the name of Eddie Katz?

A. Yes, I do.

Q. Did you ever discuss Deering-Milliken with him?

A. Yes. I believe Mr. Katz was interested with me for a short time in parachutes.

(Testimony of Leonard J. Mills.)

Q. Did he ever tell you how Deering-Milliken worked? A. No, he did not.

Q. He never did?

A. He never mentioned it, other than——

Q. Did you make any inquiries from any other sources with respect to this company that you were intending to some day, you hoped, buy 500,000 yards of merchandise from? A. No, I did not.

Q. No other inquiries whatsoever?

A. None. [133]

Q. What did you believe Mr. Piersol's authority to be?

Mr. Lincoff: Objected to, if your Honor please. I think that calls for a conclusion, calls for an opinion. Certainly, it is incompetent, irrelevant and immaterial what his conclusion was.

The Court: Sustained.

Mr. Lydiek: I think, your Honor——

The Court: I will hear you on it. I was about to say, or I think I did say "sustained." If there is some reason why it shouldn't be, tell me.

Mr. Lydiek: I think it is quite important. As your Honor pointed out, there apparently is in this, at least it appeared from the opening statement, if not from the pleadings, there is apparently in this case some question of authority of the local sales agent to enter into a contract. And I think that it is necessary for us to determine whether anything Mr. Piersol said or anything Deering-Milliken said gave this gentleman the idea that Mr. Piersol had such authority.

(Testimony of Leonard J. Mills.)

I agree that perhaps I shouldn't ask for his opinion. Perhaps I should approach it a different way, but I think we must go into the subject.

The Court: I think the field of inquiry is proper, in light of what appears to be probable contentions here, although they are not too well defined as yet. But we should not start with a conclusion of the witness. [134]

Mr. Lydick: Certainly.

The Court: But rather with what led him to that.

Q. (By Mr. Lydick): Now then, Mr. Mills, as I understand your testimony, you had made no inquiries regarding Deering-Milliken's interfunctioning and operations of your own?

A. No, I did not.

Q. Did you inquire of Mr. Piersol as to what his authority was with respect to the making of quotations or the acceptance of orders?

A. I did not.

Q. Did he ever tell you anything with respect to his authority in that regard?

A. He told me at the time that I signed an order that I had a contract with the mill——

Q. No. Just answer my question, please. Did he ever tell you anything with respect to his authority?

A. No, not any more than just that.

Q. Did anyone from Deering-Milliken ever tell you anything with respect to his authority?

A. No.

Q. In your experience in dealing with Mr. Pier-

(Testimony of Leonard J. Mills.)

sol, did you find he referred all of your inquiries to New York before giving you any quotations?

A. That is correct.

Q. Every single instance that you can recall?

A. As far as I know, yes.

Q. Did that lead you to come to any conclusion?

A. That the price, whatever I was inquiring of, he had to get from New York as to what the market price was at the time.

Q. Now, I noticed that in some of the letters that were introduced by counsel while you were under direct examination that they were confirming telephone conversations.

A. That is correct.

Q. Did you request those letters or did Mr. Piersol send them voluntarily?

A. He sent them to me. I wanted to have them; whether I requested them of him or not I do not know.

Q. Do you think you might have requested him to send you the confirmations in writing?

A. Yes, I may have. If I did——

Q. Did you ever confirm any of your inquiries in writing?

A. Did I ever—there was nothing to confirm. You mean to confirm my inquiries in writing?

Q. Yes.

A. I am not sure I understand the question, counsel.

Q. Did you ever send Deering-Milliken, prior to the time you had difficulty with them on March

(Testimony of Leonard J. Mills.)

21st, any kind of a writing of any sort whatsoever? [136]

A. No. My inquiries were simply by telephone.

Q. When did you get a quotation from Deering-Milliken for the first time?

A. Sometime after the 18th of December.

Q. Well, is that the best you can fix it, Mr. Mills?

A. That is about the best I could fix it.

Q. You are not doing as well for me as you did for your counsel.

Mr. Lincoff: Your Honor please,—

Mr. Lydick: Pardon me.

Mr. Lincoff: —I respectfully submit that the witness' memory can be refreshed, if Mr. Lydick will show him the courtesy of showing him the letter for that purpose.

Mr. Lydick: He testified to these things not more than two hours ago, your Honor.

Mr. Lincoff: I submit that statement of counsel is prejudicial. Each of them were accompanying letters or some other document to which the witness referred—

Mr. Lydick: You are saying none of that testimony was by his own recollection, but only by reference to this correspondence?

Mr. Lincoff: I am not making any such statement. I think it is for the court to draw the inference. I think there is a law of evidence that has to do with refreshing one's recollection by a perfectly proper method. [137]

(Testimony of Leonard J. Mills.)

The Court: This is not the time to argue the case. I can see arguments both ways. The argument he testified from present recollection revived is that revived by review of the documents. Also the matter that I assume he has discussed this case at some length within an immediately recent time with his counsel, and looked for and had his attention directed to those elements of the transaction and those incidents which would be important from their standpoint, and has not had his memory jogged on those points that would be adverse to his position.

I don't mean that as being critical. I know when we used to go over things with witnesses we had in mind the preparation of our case, and hence you don't expect as great a refreshed recollection when a man is on cross examination as you do when he is testifying in support of his own position. Hence, cross examination is much more liberal and the opportunity to explore and the requests for instructions to bring in documents is quite common in cross examination.

So you proceed, counsel, and if you want him to bring anything in which he doesn't have here, just ask for it and we will see what we can do.

Mr. Lydick: Thank you, your Honor.

Q. (By Mr. Lydick): When did you get the quotation from Deering-Milliken for the first time?

A. It was sometime after the 18th of December, counsel. [138] I can't recall the exact date.

I can say this: Approximately the 18th of December I was requested to start figuring on those

(Testimony of Leonard J. Mills.)

liners. Immediately after that I inquired of several mills for quotations. At that time I contacted Deering-Milliken.

Q. Yes. I know you have testified as to when you first contacted Deering-Milliken. I am asking you when Deering-Milliken first gave you a quotation, Mr. Mills.

A. Well, a few days after I contacted Deering-Milliken Mr. Piersol called me and gave me a quotation and confirmed it by letter.

Q. You contacted them around December 18th, and it was a few days afterward?

A. A few days after I contacted them.

Q. Had it been as long as, oh, 28 days, 22 days?

A. No. I had definite prices before I submitted my cost to the Government, which was the 21st of January. So I don't think it could have been as long as that.

Q. Well, December 18th to January 10th is approximately 22 days. Could it have been that long?

A. I may have been that long.

Q. Well, was the first quotation you got from Deering-Milliken the telephone quotation you received that was confirmed by the letter of January 10th that Mr. Piersol wrote to you? [139]

A. That may have been the first quotation.

Q. If that were your testimony this morning, would that be your testimony this afternoon?

A. Yes.

Q. Was the quotation oral or in writing?

A. Mr. Piersol's quotation on the price?

(Testimony of Leonard J. Mills.)

Q. Yes.

A. It was oral, on the phone, confirmed by letter.

Q. Do you have any independent recollection whatsoever as to what he said?

A. Nothing other than what is in the letter.

Q. You have no independent recollection except from the letter? A. That is correct.

Q. If I am not mistaken, that was Plaintiff's Exhibit 1, was it not? Now, you have that letter before you, Mr. Mills? A. Yes, I have.

Q. Do you recall now whether or not you had any other conversations with Mr. Piersol with respect to any widths other than the 39-inch?

A. Prior to this letter?

Q. Yes.

A. I am not certain. I mean this letter leads me to believe that was the width I asked for at that time.

Q. No. This is confirming a telephone quotation of the [140] day before (indicating).

A. I say yes, but since——

Q. Your original inquiry had been for several widths, I think you testified.

A. I may have said that. This letter leads me to believe I inquired only for the 39-inch width. I don't recall what widths I asked for at that time. There were several widths being considered.

Q. You don't recall what widths you asked for in your first inquiry? A. Yes.

Q. You are inclined to believe it was only one?

A. Since the quotation is on one.

(Testimony of Leonard J. Mills.)

Q. I believe the court has already asked you what your understanding of the word "greige" in that letter was. The sentence reads, "Confirming my telephone quotation to you, we quoted subject to previous sale Government Specification PA-PD-29 34 cents per linear yard in the greige, 39-inch wide for delivery," et cetera.

What did "in the greige" mean to you in that letter?

A. "In the greige" means unbleached, undyed, as it comes off the loom.

Q. Has that always been your understanding of what that meant? A. That is correct. [141]

Q. When you say "unbleached," or "undyed," you have reference strictly to color?

A. That is correct.

Q. In other words, the primary connotation of the expression "in the greige" is a color connotation?

A. It is as it comes off the loom.

Q. The color as it comes off the loom?

A. Well, yes, the color as it comes off the loom.

Q. That word or those words don't mean anything to you with respect to the condition of the goods?

A. No, other than it should be as per Specification PA-PD-29.

Q. Generally speaking, the word "greige" in the textile industry or your understanding of the word "greige," if you have one, has been strictly a color connotation, the natural, unbleached color as it

(Testimony of Leonard J. Mills.)

comes off the loom, but it has nothing to do with the condition as it comes off the loom.

A. I don't know anything about the technical aspects of it, so I couldn't quite know whether "greige" means anything technically as it comes off the loom.

Q. Having received this letter, did you make any inquiry as to what the word "greige" might mean?

A. No.

Q. Did you ask the engineer with whom you were working at that time? [142]

A. No, no. This letter was as per the specifications I required.

Q. I am not going to be argumentative with you, Mr. Mills. It says "in the greige" and I want to know whether that meant anything to you at all, other than just the color, the natural, unbleached, color of the cloth as it would come off the loom? It had no other meaning to you?

A. That is correct.

Q. Have you since had any reason to believe it had any other meaning or do you still think it means that?

A. I don't quite follow the question, counsel.

Q. My questions were directed to what you thought the words meant at the time you received this letter. I ask you if you still think the words mean just that.

A. As it comes off the loom, it means just that.

Q. The natural color as it comes off the loom?

A. And goods as it comes off the loom.

(Testimony of Leonard J. Mills.)

Q. You mean it may have some connotation other than a color connotation?

A. I am not that much of an expert in it, to know what you are driving at.

Q. I just want to know what you think the word "greige" means.

A. I understand that the term "greige" means as it comes off the loom. [143]

Q. As the cloth comes off the loom?

A. As the cloth comes off the loom.

Q. With no limitations or anything?

A. Well, I don't know where you want me to put limitations.

Q. When cloth comes off the loom, of course, it has several things about it. For example, it may have weighting materials, may it not?

A. I am not at all sure I understand. I have an idea what you might mean by "weighting materials." Technically, I am not sure I do.

Q. It might have dirt in it?

A. Yes, I suppose it could.

Q. It might have starches in it which they have used to strengthen the thread so it would go through the loom?

A. I don't know if they do use starches. I am not a millman. I never professed to be a millman.

Q. And it has a color when it comes off the loom, is that right?

A. The color of the yarn, yes.

Q. In other words, there is a color to the mate-

(Testimony of Leonard J. Mills.)

rial and there is a condition of the material, is that correct?

A. That is right.

Q. Now, to you does the word "greige" mean both the color and the condition of the cloth as it comes off the loom [144] or just the color of the cloth as it comes off the loom?

A. To me "in the greige," as I understood it, is the goods as it comes off the loom. In other words, you might say——

Q. The color of the goods as it comes off the loom?

A. The color of the goods as it comes off the loom.

Q. And the condition of the goods as it comes off the loom?

A. And I guess the condition of the goods possibly as it comes off the loom. Meat, whether it is raw—meat is either raw or cooked. I can tell you when meat is raw and I can tell you when meat is cooked. What condition that meat may have when it is raw, other than it is raw, I don't know. I am not a butcher.

Q. You know it has a connotation then other than color? The word "greige" has a connotation other than color? It also refers to the condition of the goods as it comes off the loom?

The Witness: Your Honor, if I am suspicious it is only because I don't understand what the counsel is trying to get from me. I mean I am at a loss here——

The Court: He doesn't understand the legal

(Testimony of Leonard J. Mills.)

effect or doesn't understand the scope of inquiry, counsel. Suppose you try it in a little different phraseology.

Mr. Lydick: Well, a piece of cloth that comes off the loom. It isn't really necessary to try different phraseology. I am confident, insofar as the words I am using, that Mr. Mills [145] understands them.

The suspicion of me is only as to the possible legal effect those words might have. All I want to know is what his idea is of what "greige" goods mean.

Q. (By Mr. Lydick): You say "greige" goods are goods as they come off the loom?

A. That is correct.

Q. The only reason I am inquiring of you to any degree at all is I think at one time you told me, and if counsel insists I will find the date and page and read it to you, you thought "greige" goods simply referred to the color of the goods as they came off the loom.

Would you care to have me go into that or permit me to go ahead with the questioning and decide later?

As I understand it, you seem to feel now that "greige" goods has some meaning other than just the color of the goods as they come off the loom, but may refer to the condition of the goods as they come off the loom, is that possible?

A. No. I always interpreted "greige" to mean as it comes off the loom.

(Testimony of Leonard J. Mills.)

Q. And it is not limited to the color as it comes off the loom, but everything about the goods as it comes off the loom?

A. That I believe is correct.

Q. Well, we will come back to it with respect to what your [146] previous testimony has been. But you do understand now it is everything about the goods as they come off the loom?

A. That is correct.

Q. That is what it meant to you on January 10, 1952, when you received this letter confirming the quotation you had requested from Mr. Piersol?

A. On January 10, 1952, I understood that the fabric being quoted was——

Q. I know what you are going to say.

Mr. Lincoff: Then may I ask he be permitted to finish his answer?

Q. (By Mr. Lydick): My entire question has been with respect to the word "greige." I continue to ask for your understanding on January 10, 1952, for the meaning of the word "greige" in that letter.

Mr. Lincoff: May I ask the court to instruct counsel to permit the witness to finish his answer?

Mr. Lydick: I respectfully submit, if your Honor please, that the answer was not responsive to my question.

Mr. Lincoff: You might have moved to strike it.

The Court: Read the question.

Mr. Ludick: I will be happy to reframe it, if that is satisfactory.

(Testimony of Leonard J. Mills.)

The Court: I could hear him start and get another breath to answer sometimes here. [147]

Mr. Lydick: May I ask the question again?

The Court: And be shifted a little by a different phrasing of the question, so suppose we just start over again with that. However, it is 25 minutes to 5:00. The Clerk has some duties before their office closes. Is this a good time to break, or do you want to take a few minutes more?

Mr. Lydick: I would just like to get the answer to just that one question.

The Court: All right. Ask it again.

Q. (By Mr. Lydick): You have testified, Mr. Mills, the previous three or four answers as to your present understanding of the meaning of the words "greige goods." Was the answer that you gave to those immediate previous questions, was that understanding that you indicated there the same understanding that you had as to the meaning of the words "in the greige" in this letter of Jan. 10, 1952, and at the time you received that letter?

Mr. Lincoff: I object to the question on the ground it is compound, complex and completely unintelligible, your Honor.

Mr. Lydick: May the question be read?

(The question was read.)

The Court: Inasmuch as I don't think he fully answered each of the questions which have been put, you are proceeding now with a great deal of haste, but I don't know that it is too much haste, that would allow him to take a moment or two

(Testimony of Leonard J. Mills.)

[148] to think of the next thing to say, he was about to say, when another question has been put to him.

I don't know that the understanding has been sufficiently developed to act as a foundation for this type of question; hence, the objection is sustained.

Q. (By Mr. Lydick): Mr. Mills, when you received this letter from Mr. Piersol on January 10, 1952, what did you believe the words "in the greige" meant?

A. That the quotation was on the fabric that I required as per Specification PA-PD-29.

Q. May I ask the question again? What did you believe the words "in the greige" meant?

A. That they complied with the specifications.

Q. On January 10, 1952, Mr. Mills, irrespective of any quotation, irrespective of any inquiry you may have made, what did you think the words "in the greige" meant?

A. Goods as it came off the loom, unbleached, undyed.

The Court: Would it have had any other kind of processing?

The Witness: I don't know of any other processing that goods normally goes through. It means as it comes off the loom, sir.

That if there are any other processing that comes—that has to be done to the goods, I mean I am not aware of any other processing there is, other than the dyeing and bleaching. [149]

The Court: Would you consider "greige goods"

(Testimony of Leonard J. Mills.)

before it is inspected or would it be "greige goods" after it has been inspected, after it comes off the loom?

The Witness: I believe it would be "greige goods" before and after it was inspected.

The Court: It doesn't refer then to any quality of appraisal, but, rather, as to the mere physical aspect of those goods as they come off the loom?

The Witness: That is correct, sir.

The Court: That was your understanding on January 10, 1952, of the meaning of the words?

The Witness: That is correct.

Q. (By Mr. Lydick): You know of no other processing that is ever done to cloth after it comes off the loom, other than bleaching and dyeing?

A. No.

Q. Have you ever heard the expression "converting"? A. Yes, I have.

Q. Do you have any idea what it means?

A. I believe it is the converting of goods to some print cloth or fabric of that nature, or design of that nature.

Q. Have you ever heard the expression "finishing"? A. Yes, I have.

Q. What does that mean?

A. By "finishing" it means that they finish a process [150] that is required in the goods.

Mr. Lydick: We will return to the subject Monday, with your permission.

The Court: I don't mean to cut you off. If you

want to go a little further we will do it. If not, we will recess.

Mr. Lydick: I think it would be just as good to recess now and take up again Monday.

The Court: Is there anything you wish this witness to bring to court with him Monday?

Mr. Lydick: Any records or files with respect to his negotiations with the Government that he has, that are not presently here.

The Court: Concerning this particular contract?

Mr. Lydick: Concerning this particular contract.

The Witness: Your Honor, may I ask regarding the specifications of thread and packing, if you would like those I would have to secure them from a government office.

Mr. Lydick: I only want them if they are in your files. I want nothing you have to secure.

The Witness: I do not believe I have those any longer.

Mr. Lydick: Thank you, your Honor, for the time indulgence. I trust counsel will permit me to apologize. He asked me if I would agree with 4:15 recess. I said I certainly would. It is 20 minutes of 5:00.

The Court: You let us know any time you want to adjourn [151] at a particular time and we will try to meet the necessities of counsel in that regard. The recess now will be until 10:00 a.m. Monday.

(Whereupon, at 4:40 o'clock p.m., Friday, November 20, 1953, the hearing was adjourned until Monday, November 23, 1953, at 10:00 o'clock a.m.) [152]

Los Angeles, Monday, Nov. 23, 1953, 10:45 a.m.

The Court: All right, gentlemen.

LEONARD J. MILLS

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Lydick): If my recollection serves me correctly, Mr. Mills, we were, at the close of the Friday session, discussing your understanding of the meaning of the term "greige," meaning greige goods. I will go forward from there.

I don't recollect whether I inquired or not, but I wonder if you recollect the definition of "greige goods" that you gave at the time of your deposition. Do you? A. No, I am not sure.

Mr. Lydick: I have not received a signed copy of the deposition, nor has Mr. Lincoff received a signed copy of Mr. Piersol's deposition.

I have discussions the corrections which Mr. Piersol wishes to make.

May I inquire, counsel, if there are any corrections that Mr. Mills wishes to make in his deposition on pages 91, 92 or 93? [155]

Mr. Lincoff: If your Honor please, there are no corrections on the original deposition of Leonard J. Mills on page 91. There are no corrections in the deposition of Leonard J. Mills on page 92, and on page 93 of the deposition of Leonard J. Mills, at

(Testimony of Leonard J. Mills.)

line 3 the word "neither" is changed to "either," and on line 4 the word "nor" is changed to "or."

Other than that, there are no changes on pages 91, 92 and 93 about which counsel for the defendant has made inquiry.

Q. (By Mr. Lydick): Mr. Mills, on the date of your deposition, which, if I am correct, was November 2, 1953, about three weeks ago, I asked you at page 91, line 8, of your recorded deposition:

"Q. Do you know what greige goods is?

"A. Greige goods in the term is goods that have not been dyed to any particular color."

And I continued on and said:

"Q. Greige goods are goods that have not been dyed to any particular color?

"A. That is right."

Is that still your definition of greige goods?

A. That is correct.

Q. Does the term, or did it on November 2nd have any other meaning to you?

A. Well, yes, greige goods is as it comes off the loom. It means it is undyed, to any color. [156]

Q. That is still your definition?

A. That is right.

Q. Mr. Mills, referring back to your testimony regarding your first conferences, or your first inquiries to Deering-Milliken and their response thereto, which I believe was contained in a letter of January 9, 1952, at that time did you know the meaning of the term "finished goods"?

A. I am not sure whether my meaning of the

(Testimony of Leonard J. Mills.)

term "finished goods" is correct and agrees with yours.

Q. I did ask you if you did know the meaning of it then.

A. I had no occasion to question myself as to what the meaning of "finished goods" was then.

Q. Are you testifying that at that time you did not know the meaning of "finished goods"?

A. I have an idea of what "finished goods" now in my opinion is.

Q. Did you have an idea then?

A. I had the same idea then, yes.

Q. What is that?

A. That finished goods is finished to the specification that it was meant for, that was sent up for it.

Q. In other words, the only knowledge you had of the term "finished goods" had relation with respect to finishing to some specification? [157]

A. That is right.

Q. Do you know what a finishing plant is or did you at that time? May I rephrase the question? Did you at that time know what a finishing plant was?

A. Not too well.

The Court: What was your idea of what a finishing plant was?

The Witness: As I say, I haven't got too good an idea what a finishing plant was.

Q. (By Mr. Lydick): Did you at that time know what a converter was?

A. My impression of a converter then, as now,

(Testimony of Leonard J. Mills.)

is one that converts goods from one state to another state.

Q. Do you mean by that that he owns or has facilities by which he does his converting?

A. I believe so.

Mr. Lydick: If the clerk please, may I have what I believe is Plaintiff's Exhibit 1 so I can show it again to the witness and permit him to refresh his memory therefrom, if necessary?

Mr. Clerk: Yes, sir.

Q. (By Mr. Lydick): So that the wording of that first letter which you received from Deering-Milliken may be clear, would you be good enough to read it? A. Yes. [158]

"Dear Mr. Mills:

"Confirming my telephone quotation to you, we quoted subject to previous sale Government Specification PA-PD-29 34 cents per linear yard in the greige, 39 inch wide for delivery March through August on terms of net 30 days f.o.b. Spartanberg, South Carolina.

"We shall hope to have a substantial order from you.

"Very truly yours,

"Deering-Milliken & Co., Inc.

"Lee Piersol, Regional Manager."

Q. Did you at that time think you had a contract with Deering-Milliken?

A. This is just a quotation to me of a price.

(Testimony of Leonard J. Mills.)

Q. Did you have any conversations with Mr. Piersol regarding the 55-inch width that you had requested a quotation on?

A. There were several widths I spoke to Mr. Piersol about. I don't recall——

Q. Let's limit ourselves to this first conversation, if we may, Mr. Mills, and to my question: If you don't recall, tell me you don't recall and you wish to explain something you want to make an explanation on, but, as I understood your testimony, your first request was for 39-inch width quotation [159] and 55-inch width quotation, is that correct?

A. It may have been, I don't recall.

Q. You don't remember? A. No.

Q. You don't remember whether you had any discussions with Mr. Piersol as a result of this letter regarding a 55-inch width or not?

A. I don't recall.

Q. Do you have any recollection of any conversations with Mr. Piersol regarding this letter, either before or after?

A. Only that my conversations with Mr. Piersol were for the goods as per specification PA-PD-29 in several various widths.

Q. Did you intend this inquiry you had made, that led to this quotation, to be a firm order?

A. No, sir. I intended to get a price with which I could submit then my proposal to the Government, to see if the Government order would come through.

(Testimony of Leonard J. Mills.)

Q. But your answer was you did not intend your inquiry to be a firm order?

A. I hoped my inquiry would lead up to a firm order.

Q. But you did not intend it to be a firm order?

A. I again put it that way: This was a quotation request for a price which I hoped would lead to a government contract and, in turn, a firm order to Deering-Milliken. [160]

Q. Can you answer yes or no, whether or not you intended this inquiry to be a firm order to Deering-Milliken?

A. I intended it to be a firm order eventually.

Q. But you didn't intend it to be a firm order at this time? A. No.

Q. Thank you.

A. This letter itself wasn't firm.

Q. Thank you.

The Court: What is the exhibit number on that letter?

The Witness: Exhibit 1, your Honor.

Q. (Mr. Lydick): That was the first response that you received in writing, to my inquiry, from Deering-Milliken, is that correct?

A. That is correct.

Q. Had you received this same information prior to the time you got this letter?

A. Yes, by telephone.

Q. Can you recollect whether or not you requested this letter or whether Mr. Piersol just sent it?

(Testimony of Leonard J. Mills.)

A. I requested a letter, too, yes.

Q. Prior to this first request to Deering-Milliken, and this response thereto, had you made inquiries to any other sales agencies or brokers or mills or anyone else? A. Yes, I did. [161]

Q. For quotations to these specific goods?

A. I did.

Q. Who were they?

A. J. P. Stevens, and Iselin-Jefferson. There were three or four others, I just can't recall their names offhand.

Q. Did they have local offices?

A. I believe that most of them did. There may have been one or two that didn't have a local office.

Q. Did you make any inquiries at all directly to the mills?

A. My inquiries were directed to the sales offices of these various companies.

Q. I see. None were directly to the mills?

A. No. I don't know that that would be the proper procedure.

Q. How were these inquiries made, the same way as Deering-Milliken, by telephone?

A. Local offices were by telephone, yes.

Q. Local calls? A. Yes.

Q. Did you receive any quotations from any of those people as a result of those calls?

A. Yes, I did.

Q. Do you recall what any one of those quotations was?

(Testimony of Leonard J. Mills.)

A. They were various prices, but none of them as low as [162] Deering-Milliken price.

Q. Do you recall any one of them specifically?

A. The actual price?

Q. That is correct.

A. No, other than the fact they were higher than Deering-Milliken.

Q. Did you request any of them to be confirmed in writing?

A. Yes, all of them were usually confirmed in writing.

Q. Do you have those confirmations with you?

A. On the quotations?

Q. That is correct.

A. No, sir, I did not bother saving those after I picked on Deering-Milliken's quotations as the one.

Q. You picked on it immediately, is that correct?

A. I picked on it as soon as I issued——

Q. Did you pick on it as a result of these first inquiries and responses?

A. No. By the time I had received the quotations from all of them and found Deering-Milliken to be the lowest, I then considered Deering-Milliken only.

Q. And you destroyed all the correspondence with the others?

A. Yes, in time. I mean I made no effort to save them. They were of no importance at all. [163]

Q. Do you recall what these quotations were?

(Testimony of Leonard J. Mills.)

For example, did any other quotation, either in writing or orally, quote you "in the greige"?

A. Yes, I believe so.

Q. Who was that?

A. Well, on several of the other mills—I don't recall, I don't recall if all of them quoted "in the greige," or just a few of them "in the greige," but I know there was at least one other that was "in the greige."

Q. Which one was it, do you recall?

A. I don't recall.

Q. Was it J. P. Stevens?

A. I couldn't say at this time.

Q. Was it Iselin-Jefferson?

A. As I say, I couldn't say at this point.

Q. Did any of them quote to you in any manner indicating they were quoting unfinished goods?

A. No, sir. The only answer was to meet Specification PA-PD-29.

Q. Isn't it a fact—are you finished?

A. No, I am not.

Q. Isn't it a fact, Mr. Mills, that the Iselin-Jefferson plant quoted you f.o.b. finishing plant?

A. I don't recall that at all.

Q. If they had, would it have meant anything to you? [164]

A. Not so long as it met Specification PA-PD-29.

Q. In other words, you didn't know what "finishing plant" meant?

A. That is correct.

Q. You can't give me the name of any other company whom you might have called, whom you

(Testimony of Leonard J. Mills.)

could check to see if they quoted you "in the greige"?

A. If I looked over a list of names I could tell you whether I had called them or not.

Q. They would be local people?

A. In most instances.

Q. You made no inquiries otherwise?

A. In most instances they were local.

Q. Wasn't your recollection that they were all by phone call?

A. I said the local sources were by phone call.

Q. Do you recall making any inquiries anywhere, other than locally?

A. I believe I made some inquiries, I can't recall just——

Q. Who was that with?

A. If I saw a list of mills I can point out those that I inquired of. When I say "mill" I mean sales offices; whether that is the same as the mill I don't know.

The Court: Would you be able to find such a list, to [165] refresh your recollection, in the telephone book?

The Witness: No, sir. There is a book that is put out by the textile trade which lists all the mills, all the sources of supply for rayon goods and such. I believe it is put out by Women's Wear Daily, for example.

The Court: You don't have it here?

The Witness: No, sir, I haven't.

Q. (By Mr. Lydick): You say you can't give

(Testimony of Leonard J. Mills.)

me the names of any other sales agencies that you contacted, other than Iselin-Jefferson and J. P. Stevens. Could you give me the names of any other cities at which you made inquiry, other than Los Angeles?

A. You are referring, I believe, to the initial inquiries, aren't you?

Q. That is correct.

A. I can't recall at this moment who I did inquire of at the beginning.

Q. Well, you remember J. P. Stevens?

A. Yes.

Q. You remember Iselin-Jefferson Company?

A. Iselin-Jefferson Company, yes.

Q. Can you recall any other city where you made an inquiry? Did you, for example, make an inquiry at San Francisco?

A. No, sir. [166]

Q. Chicago?

A. I don't believe so.

Q. And other cities you can think of, other than Los Angeles?

A. No, sir, I can't recall.

Q. To the best of your recollection, Los Angeles was the only place where you made inquiries?

A. I said local offices. I made several inquiries, and I believe I made some from out of town, just where I don't know.

Q. You can't tell me what city?

A. I can't, no.

Q. What prices were these quotations that you received from any of these other sources that you inquired of?

(Testimony of Leonard J. Mills.)

A. They varied from, oh, 2, 3 cents and higher, and more above the Deering-Milliken quotation.

Q. Which was the closest, do you remember?

A. I don't even recall that.

Q. Did you have any discussions with these various sales agencies' prices with the government people?

A. No, sir, there was no occasion.

Q. You have no writing regarding any of these inquiries or quotations whatsoever?

A. No, sir.

Q. Most of the quotations were f.o.b. somewhere, other [167] than Los Angeles?

A. Or the quotations were f.o.b. the source of supply.

Q. Did you know at that time whether or not these sales agencies represented mills that may have specialized either in greige goods or finished goods?

A. No, sir. I made inquiries of several mills. I have even gotten answers from some, they did not make that particular type of goods.

Q. But you didn't realize at that time that some of them might have only represented greige goods mills and others might have only represented finished goods mills?

A. No. I called the offices and asked if they could supply goods as per Specification PA-PD-29. They either advised me, they either gave me a quotation or advised me they did not have that goods.

Q. You had these specifications in your posses-

(Testimony of Leonard J. Mills.)

sion at all times during the time you received all these quotations? A. Yes, sir, I did.

Q. The fact that Deering-Milliken quotations or anyone else's quotations that you might have received as to "in the greige" meant nothing with respect to this specification?

A. Not so long as it was as per Specification PA-PD-29.

Q. Was this first contact with Deering-Milliken and these other sources you have no record of before or after you had commenced your negotiations with the Government? [168]

A. When you say "commenced" my negotiations, are you referring to before my initial contact with the Government or when they inquired of my plant?

Q. Well, let me put the question another way: At the time of these inquiries and the responses thereto, at what stage were your negotiations?

A. Well, the Government advised me they would be interested in my supplying them with a price on what it would cost the Government for these liners. I then made inquiry from these various mills for the fabric as per Specification PA-PD-29.

Q. During the time of the inquiry to Deering-Milliken, for example, which you testified was around the 18th of December, and during the time you received the responses to that inquiry on January 8th or 9th, whatever the letter says, did you have any further negotiations with the Government?

(Testimony of Leonard J. Mills.)

A. Nothing, no negotiations other than my preparing the figures.

Q. Preparing what figures?

A. The costs, my costs on this particular work.

Q. Did you prepare costs before you received responses to your quotations?

A. Yes. I had taken cost into consideration of it.

Q. On what did you base the cost of goods?

A. I didn't have any cost on goods until they first [169] determined what would be the cost of the goods.

Q. That would be around January 8th or 9th, so far as Deering-Milliken was concerned?

A. Yes.

Q. Going back to my question again——

A. It may have been even at a later date, because I made further inquiries of different widths which may have resulted in a lower cost of goods in the wider widths, which I believe is the case.

Q. So that you had no discussions with the Government then during the period December 18th until after you got these cost figures?

A. That is correct.

Q. Page 43 of your deposition on November 2nd, Mr. Mills, at line 13—let's go back to line 7 to start off correctly. I asked you the question, "When did you think was the first time you ever spoke to Mr. Piersol?"

And you answered, "I am not sure whether the first time was before I submitted my price to the Government or after I submitted my price to the

(Testimony of Leonard J. Mills.)

Government and was advised that I would get the contract."

A. That was in person, I believe, was the inference there, when I saw him in person, wasn't it?

Q. Well, the question was, "When do you think was the first time you ever spoke to Mr. Piersol?"

You tell me now you understood that question to mean you spoke to him in person.

A. If I said I wasn't sure as to whether it was before or after I received the contract from the Government, it definitely must have been whether I saw him in person, because I spoke to Mr. Piersol distinctly several times prior to my getting the notice from the Government that I would get the contract.

Q. I see. Well then, immediately following the question was, "When do you think that was you submitted the price to the Government?"

And your answer was, "The 18th of December, approximately, and I saw Mr. Piersol for the first time. I spoke to him on the phone several times before I saw him for the first time. Now, whether that was before I received word that the Government would give me the contract or right after that I am not sure."

Do you recollect that testimony?

A. Yes. I noticed that in my deposition—and I believe I made a correction there——

Mr. Lincoff: Your Honor, I would like to advise counsel that on page 43 of the deposition of Leonard Mills appear the following changes:

(Testimony of Leonard J. Mills.)

At line 13 the word "was" is stricken, so that the question now reads, "When do you think that you submitted the [171] price to the Government?"

Mr. Lydick: You are changing my question?

Mr. Lincoff: No.

Mr. Lydick: You are.

Mr. Lincoff: I think that is only a typographical error, the addition of the word "was."

I think if you read it the word "was" doesn't belong in that.

Mr. Lydick: I agree with that.

Mr. Lincoff: On line 15, on the same page, the word "December" is changed to "January."

On line 21, the word "December" is changed to "January."

On line 22, the word "January" is changed to "February."

Line 23, the word "January" is changed to "February."

There are no other corrections, except as indicated.

Q. (By Mr. Lydick): With respect to those questions counsel has pointed out to the court, what was it, between November 2nd and today, whatever date it was, that refreshed your recollection as to those dates?

A. Going over the dates of the various documents and so on in the files, which gave me an opportunity to chronologically put each of the items in its place.

(Testimony of Leonard J. Mills.)

Q. What documents were they that required you to make this change?

A. For example, starting with December 18th was when [172] the Government first submitted this proposal to me to—or, rather, approached me to consider——

Q. What document did you have in your file to indicate that that was the time the Government first approached you?

A. I am not sure. Mr. Lincoff has my papers there. I am not sure just what it was.

Q. Do you care to look at them, to find out which one it was?

Mr. Lincoff: Let the record show I am placing before Mr. Mills two Manila folders containing various documents, which I will state to the court are the only files, other than my own working papers, handed to me by Mr. Mills.

Those, of course, as well as everything in my own file, personal files, which are not strictly confidential are also available for Mr. Lydick to examine about.

The Court: Do you think we ought to have these files marked for identification?

Mr. Lydick: No. Just for the purpose of refreshing his recollection.

The Witness: The proposal to figure on the 75 mm liners, and which we received the same day the proposal to figure on the 105 mm liners, was dated the 18th day of December.

Mr. Lydick: Do you have any objection if I look at that?

(Testimony of Leonard J. Mills.)

Mr. Lincoff: Not at all.

Q. (By Mr. Lydick): I take it then that at that time, [173] that is, the time of the response to the first inquiry you had made, by Deering-Milliken, was dated around January 8th or 9th. You have it before you. At that time you had not submitted any prices or figures to the Government at all?

A. That is correct.

Q. You have corrected your deposition, accordingly, after having refreshed your recollection during the intervening three-week period by reviewing your file?

A. That is correct.

Q. You had not reviewed your file at the time of your deposition?

A. No, I had not.

Q. What did you do after receipt of this letter from Mr. Piersol?

Mr. Lincoff: Please read the question.

(The question was read.)

Q. (By Mr. Lydick): Of course, with respect to this particular situation of the contract with the Government.

A. It was some time after the receipt of that letter, within a day or two or so, when I had received answers to my inquiries from the various sources that I reached—I don't believe it stopped with that letter. There were further inquiries for further widths, so nothing was done until I had determined what the cost of the goods was going to be.

Q. When was that? [174]

(Testimony of Leonard J. Mills.)

A. Well, sometime prior to the 21st of January, when I submitted my figures to the Government.

Q. On January 21st for the first time you submitted some figures to the Government, is that correct?

A. I believe the date was January 21st.

Q. Do you have anything in your file that permits you to fix that date as being on or around that time?

A. To the best of my recollection I think the 21st of January was the date that I was supposed to submit the figures to the Government.

Q. Do you have anything in your file to verify that?

A. I don't recall whether there was or not.

Q. Do you mind looking——

A. I have nothing here that would indicate the 21st of January. However, I am quite certain that the 21st of January was the date at which the proposal was to be submitted—my figures were to be submitted to the Government.

Q. At the time of the deposition you thought it was probably sometime in December?

A. If that is so in the deposition, it is not correct, because I had until the 21st of January in which time to submit the figures to the Government.

Q. Then on January 21st you believe is the time you did submit the figures to the Government?

A. That is correct. [175]

Q. You have nothing in your file that indicates

(Testimony of Leonard J. Mills.)

that would be the case, that is just a recollection?

A. I have nothing here that would indicate that, no.

Q. You recollect that date specifically or about that date, is that correct, Mr. Mills?

A. We did come to that conclusion in setting these dates up right along. It couldn't have been in December because I didn't have any quotations from Deering-Milliken before the——

Q. You came to that conclusion in setting up these various dates after your deposition and before trial?

A. That is correct.

Q. Do you recollect any additional inquiries to Deering-Milliken prior to this January 21st date, when you submitted these quotations to the Government?

A. Yes, I believe I have some letters giving me further quotations prior to that date.

Q. Do you have any recollection of any previous conversations that are not referred to in the letters?

A. I recollect there were conversations. I don't recall just which——

Q. Do you, by chance, recollect that after receipt of the January 8th or 9th quotation that you requested an option on those goods from 30 to 60 days?

A. Yes, when we submitted our figures to the Government [176] we had to submit with our figures how long that price would hold. So that the Government would have time to consider. And I did consult with Mr. Piersol on a 30-day figure.

(Testimony of Leonard J. Mills.)

Q. What did he tell you?

A. That it would be subject to the mills having the looms available at that time. But that the chances were very good, but there was no way they could commit themselves for 30 days.

Q. Did he tell you you could not have an option?

A. He did not say we could not have an option. I guess he did imply we could not have an option in that sense, but the chances are the loom being available. Incidentally, I passed that on to the Government in that sense, and they said, "That is customary, that an option is not secured on the goods." But that they would give us an answer as quickly as possible, so we could tie up the loom space.

Q. Was it customary that the Government tell you that an option not be given or did the Government tell you they had to have a figure that would hold good for a period of time?

A. It was customary that an option is not given to tie up the loom space just so long as the price is fairly within its limits.

Q. Mr. Piersol told you that any quotation was subject to there being loom space available and the mill accepting or [177] rejecting a particular order.

A. For a 30-day period.

Q. Did he give you a 30-day option?

A. No, he didn't.

Q. He refused the option?

A. That is right.

(Testimony of Leonard J. Mills.)

The Court: You say for a 30-day period. Where did you get that understanding?

The Witness: Because the Government wanted 30 days' time, asked if they could have as much as 30 days' time to consider my proposals. I tried to get a 30-day option from Mr. Piersol, which he couldn't give me.

The Court: Now we are getting down to where you are giving conclusions, and this case involves particularly your relation with Mr. Piersol and his company, rather than with the company.

Tell us what you said to him and what he said to you, which led you to that conclusion.

The Witness: I asked Mr. Piersol if I could have a 30-day option and he said he could not give us an option for 30 days.

Q. (By Mr. Lydick): Did he tell you why?

Mr. Lydick: Excuse me, your Honor.

The Witness: That the mill would not tie up its loom space for that length of time. [178]

Q. (By Mr. Lydick): When was your next inquiry for any quotation to Deering-Milliken?

A. There were some changes that I started to consider in the width of the fabric. I called Mr. Piersol and asked him for the price to that particular width.

Q. Was this before you made your proposal to the Government?

A. No, this was at the—yes, I am sorry, before I made any proposal to the Government.

(Testimony of Leonard J. Mills.)

Q. Does that refer to the January 16th letter you testified to on your direct testimony?

A. You mean the next quotation, January 16th?

Q. Yes. A. Yes.

Q. I believe that is Plaintiff's Exhibit 2. With that document before you, Mr. Mills, do you have any better recollection of what your next inquiry to Deering-Milliken was for?

A. Yes. From this letter it would be for a 42 $\frac{1}{2}$ -inch width, a 45 $\frac{1}{2}$ -inch width, and it seems that I may have asked them on the phone for a 47 $\frac{1}{2}$ -inch width, which I made a notation in pencil on there.

Q. You think the 47 $\frac{1}{2}$ -inch width was about this same time?

A. Well, it was immediately after my receiving this [179] letter, since I made a penciled notation on the letter.

Q. Well, there are many pencil notations on letters. Were those price notations made immediately after the letter?

A. Yes. In other words, on approximately the 16th of January I received this letter. The letter is for 45 $\frac{1}{2}$ -inch width at 38 $\frac{1}{2}$ cents, and 42 $\frac{1}{2}$ -inch width at 36 $\frac{1}{2}$ cents.

I then made a penciled notation on there showing 47 $\frac{1}{2}$ -inch width at 39 $\frac{3}{4}$ cents.

Q. Is that higher or lower than the letter figure?

A. That pencil notation, there was no letter figure for 47 $\frac{1}{2}$ -inch width in the letter itself. In other words, I added the 47 $\frac{1}{2}$ -inch width.

(Testimony of Leonard J. Mills.)

Q. You think you did that immediately after this letter?

A. Within a day or two after getting his letter, when I may have made it.

Q. What other pencil notations are there on the letter?

A. Then there shows a price reduction, in other words, the 47½-inch width, the initial price was 39¾. That is crossed over and marked 38½.

45½-inch width, with a typed price of 38½ cents, is reduced to 37¼ cents.

Q. When did you make those pencil notations?

A. When an inquiry from Mr. Piersol resulted in a lowering of the price, to the prices I mentioned. That may have resulted sometime later. I don't know just when. [180]

Q. What makes you think you made some of these pencil notations immediately afterward and some of them sometime later? You don't know just when?

A. That is right.

Q. What makes you think that?

A. Because of the fact that the prices were changed, which was only as a result of an inquiry from him.

Q. My question again was, what makes you think that the pencil notations you made regarding the 47½-inch width was immediately after the telephone call that is referred to in that letter, whereas the price notation changes were sometime later, you don't know when?

A. Because a price change such as that, amount-

(Testimony of Leonard J. Mills.)

ing to a fraction of a cent, may have resulted because of a difference in time of as much as a week on to two weeks, possibly. Whereas, price change wouldn't take place in a matter of a day or two.

Q. No other reason? A. That is right.

Q. That you could think of?

A. That is my conclusion.

Q. As a matter of fact, isn't it true that you later requested that a better price be quoted?

A. I most certainly would have. I believe I did, too.

Q. Didn't you testify in your deposition that this [181] price was voluntarily reduced?

A. It may have been voluntarily reduced, too. I didn't say I wouldn't request a better price. I said I most certainly would. I always would request better prices, whenever I am looking for a price on something I want to buy.

Q. These notations here, which you think indicate a better price had been obtained, do you recall whether you requested a better price and that led to the changes in these notations?

A. I don't recall whether I requested them.

Q. What is the date of this quotation?

A. January 16th.

Q. Do you believe, or, did you believe that was a contract? A. No, sir.

Q. Was it after you received this letter that you made your first proposals to the Government?

A. I believe that is correct.

Q. Had you had any additional responses from

(Testimony of Leonard J. Mills.)

any of these other responses that you have mentioned? A. I did.

Q. During that period?

A. I don't know just when they took place, but it was prior to this date—or prior to the 21st, I would say.

Q. Prior to the 21st? [182] A. Yes.

Q. Did you have any responses from any of the people of whom you had inquired after the 21st?

A. The people I inquired of after the 21st you are referring to is like Paul Whitin & Company, is that right?

Q. No. I mean inquiries for quotations to go ahead with the Government.

A. No, I don't believe there was any inquiry after Deering-Milliken notified me they couldn't supply, weren't able to ship the first shipment of goods to me.

Q. After January 21st you had no negotiations with any sales agencies until after your trouble with Deering-Milliken? A. That is correct.

Q. When was the next time you made any inquiry of Deering-Milliken?

A. When the Government advised me that the contract would be mine for the 105 mm shells, I then got together with Mr. Piersol.

Q. When had the Government advised you that the contract would be yours for 105 mm shells?

A. About the 5th of February.

Q. About the 5th of February? A. Yes.

Q. At that time the Government told you that

(Testimony of Leonard J. Mills.)

the contract would be yours for the 105 mm portion? [183]

A. That I was being considered for that contract.

Q. That you were being considered for that contract? A. Yes.

Q. As a matter of fact, Mr. Mills, you knew before you had any contract at all it had to be reduced to writing, insofar as the Government was concerned, didn't you? A. Oh, yes.

Q. Was the February 6th contact the next one with Deering-Milliken, you believe?

A. That is correct.

Q. Those were your personal conversations you testified to with Mr. Piersol?

A. That is correct.

Q. Wherein you discussed the specifications with Mr. Piersol and you discussed the differences with them?

A. The specifications were always in the conversation and negotiations.

Q. This was later sometime in your office?

A. That is correct.

Q. This was done in an office?

A. Yes.

Q. And laid them out on the table?

A. That is right, shortly after the 6th of February. On the 6th of February I was advised by the Government and within a day or two I was over at Mr. Piersol's office, telling [184] him the good news.

Q. What was the good news again?

(Testimony of Leonard J. Mills.)

A. That the Government was considering my proposal, that the Government was accepting my proposal to manufacture those liners.

Q. I don't want to trap you, Mr. Mills. I would like to know whether they were just considering you or had accepted your proposal.

A. At that time they had accepted my proposal.

Q. This was sometime immediately after the 6th of February, is that right?

A. That is correct.

Q. Now, after the 6th or 7th or 8th of February conference with Mr. Piersol, the exact date you don't remember, what was the next contact you had with Deering-Milliken?

A. Between the 6th of February and the 6th of March I was negotiating with the Government on the price, and secured a 10 per cent price increase on my initial price I had submitted to the Government.

I may have at that time discussed delivery dates with Mr. Piersol, too, because the Government was quite interested in a delivery schedule to them. The initial schedule that was in the initial proposal that was drawing to a very tight margin there, between the government contract and the time of the first delivery, so that we got a new schedule from the [185] Government, and we were trying to fit that together with Deering-Milliken, and we were consulting with Mr. Piersol and the Government at the same time.

I also was able to secure an increase of 10 per

(Testimony of Leonard J. Mills.)

cent in the price from the Government on these liners.

Mr. Lydick: Now, would you read my question again, Madam Reporter?

(The question was read.)

The Witness: I don't recall any exact date, other than the fact there were several between the 6th of February and the 6th of March.

Q. (By Mr. Lydick): Those were concerning delivery schedules?

A. Delivery schedules, yes, sir, was one thing.

Q. What else?

A. I believe I got a lower price from Mr. Piersol, too, on the fabric.

Q. Anything else that you remember discussing during that period?

A. Yes. I made inquiry of him—the Government asked me for a pilot run. I then called Mr. Piersol and asked him if he would let me have approximately 50 yards of this fabric, as per specification PA-PD-29, on which we were negotiating.

Q. This was again between February 6th and March 6th?

A. I am not sure of that date, as to when that incident [186] came up. But it was sometime around the 6th of March there, or I believe it was after the 6th of March, I guess.

Q. What else did you discuss besides delivery and price between February 6th and March 6th that you can recollect?

A. I can't recollect anything else.

(Testimony of Leonard J. Mills.)

Q. Did you make any inquiries regarding new widths during that period?

A. I am not sure whether I had or not.

Q. Do you think you would have?

A. I may have, if there was reason to.

Q. Were you still negotiating with the Government then for some reason?

A. Yes. My negotiations with the Government at that time was as to price. And also delivery schedule.

Q. You have a letter, I believe, you introduced—probably Plaintiff's Exhibit 3—dated February 8, 1952. So that your recollection can be refreshed, I show you that letter and ask you whether or not you had inquired for the figures noted therein?

Will you read that letter for the court and myself?

A. Yes. The letter is addressed to me.

“Pursuant to our conversation this morning, I am confirming the price as of January 21, 1952, on Specification PA-PD-29, 47½-inch width, which is 39¾ cents. You are, of course, aware that our price is subject to [187] change without notice.”

It is signed by Henry Kramer of Deering-Milliken & Co.

The Court: What is that exhibit number?

The Witness: Exhibit No. 3, sir.

Q. (By Mr. Lydick): It is dated February 8th, is it not? A. That is correct.

Q. It has to do with this 47½-inch width, does it not? A. That is correct.

(Testimony of Leonard J. Mills.)

Q. Why does it confirm a quotation as of January 21st?

A. At this time I am not able to recollect as to the reason for this delay. It may have been late in getting out of the Deering-Milliken office.

Q. Isn't it a fact that the quotation had been given to you orally on January 21st, and it was on this date or about this date that you requested it be confirmed in writing?

A. I don't know that I made a request for it to be confirmed in writing; I may have. I just don't recall whether I had or whether it was sent to me.

Q. Mr. Mills, what, if anything, did you know about Deering-Milliken when you first came to their local sales office in Los Angeles?

A. Nothing, other than the fact that they are one of the leading fabric houses in the country.

Q. Did you know they were a sales agent?

A. I had no idea as to whether they were called a sales [188] agent or the actual manufacturers, or just what. They were one of the national, largest national concerns in the country for the securing of various types of fabric.

Q. Did you know whether they manufactured these fabrics themselves, that is, loomed them themselves?

A. I had no idea of just whether they owned the mills or they represented the mills in some way or other.

Q. By this time of February 6th to March 6th,

(Testimony of Leonard J. Mills.)

that period in there, had you acquired any additional knowledge regarding their function?

A. No, I had not.

Q. Several times during your deposition you testified to the effect that Mr. Piersol had to refer everything to New York.

A. That is correct.

Q. You had learned that much, hadn't you?

A. Well, yes. Whenever I would make an inquiry of Mr. Piersol he would say, "I will get in touch with New York and get a current quotation on it or find out if the mill can meet such and such a schedule, or what the price will be of this rather than the other width."

Q. Everything had to be referred to New York?

A. That is correct.

Q. Mr. Mills, had you after these nearly two months of negotiations learned anything else about Deering-Milliken [189] and its operations?

A. Nothing.

Q. Had Mr. Piersol at any time told you that when and if you did get ready to give an order, that order would have to be submitted to New York?

A. Well, I imagine the implication is just that.

Q. Did he imply to you that during that period—did you know or had you learned by that time, after some two months of these inquiries and quotations, that if you did submit an order it would have to be accepted by someone other than Mr. Piersol?

A. No, I didn't learn anything like that.

(Testimony of Leonard J. Mills.)

Q. Did you have any impression regarding that?

A. My impression was that Mr. Piersol could accept the order; whether he had to clear it with New York first or not I don't know, but that he could accept the order right there.

Q. That was your impression?

A. That is right. That very definitely was implied to me, too.

Q. By whom? A. By Mr. Piersol.

Q. When?

The Court: You are giving us a legal conclusion, it was implied by Mr. Piersol. You don't have to say what Mr. Piersol said or did that amounted to an implication, to you [190] it is up to the judge to decide whether that was sufficient to justify what you contend.

Q. (By Mr. Lydick): When and what did he say that gave you that impression?

A. Every one of his letters was addressed as regional manager. That in itself would imply that.

Q. Mr. Mills, didn't you just testify that you knew that he had to refer to New York even an inquiry for quotation?

A. That is right, because the market price was in New York; it wasn't out here. Not that the market price was possibly in New York, but New York may have had to inquire of the mill, in turn.

Q. Is that what he told you about this market price being in New York or is that what you assumed?

A. That is what he told me every instance that

(Testimony of Leonard J. Mills.)

I inquired for some information on something, and he always referred it back to New York to get that information.

Q. Did he tell you why he referred it back to New York?

A. Because the price was there. In other words, the price may vary on the yarn and such.

Q. The price, is that part of an order?

A. Beg pardon?

Q. Is the price a part of an order?

A. I assume so. [191]

Q. Then don't you think he would have had to refer to New York before he could accept the order, too?

A. It is my understanding he did.

Q. It is your understanding that he also had to refer to New York before he could accept an order, is that correct?

A. It is my understanding that he did do that before he accepted the order.

Q. I know, but was it your understanding he had to? A. Yes, that is correct.

Q. You did understand at that time it was necessary to submit an order in writing, when you got ready to submit a firm order?

A. That is correct.

Q. Did you understand at that time that it was necessary, for the acceptance of that order, to be in writing? A. That is correct.

Q. Was it your understanding at that time that if there was an order and an acceptance, that all of

(Testimony of Leonard J. Mills.)

the terms of that order and acceptance would have to be reduced to writing and then signed by you and signed by Deering-Milliken?

A. It is my very definite and clear understanding that I had received a firm contract from Deering-Milliken before I committed myself to the Government.

Q. I don't believe that is entirely responsive.

Mr. Lydick: Will you please read the question, Madam [192] Reporter?

(The question was read.)

Mr. Lincoff: At this time, your Honor please, I wish to interpose an objection. I refrained this far, although I thought all these questions about your understanding, along the line of your Honor's comment, are incompetent. They are improper as to what your understanding is. That calls for a conclusion or opinion and invades the court's province. On that ground it would be incompetent.

I think he should ask, as your Honor suggested, "What was your conversation or what did Mr. Piersol do or what did Mr. Piersol say?" We do not want to create the impression we have any information to withhold.

I think the way the question is framed it calls improperly for speculation by this witness. On that ground I will object.

The Court: The objection with respect to the form of the question is good, and sustained.

Mr. Lydick: Without objecting to your ruling——

(Testimony of Leonard J. Mills.)

The Court: You might ask me to reconsider.

Mr. Lydick: It isn't necessary. I will be happy to reframe the question.

It is my understanding that it is entirely proper in a contract proceeding, where we don't have the alleged instrument set out before us, and we can see it, where we have something [193] else, promissory estoppel perhaps, or a series of conversations, we can look into these people's minds and ask them what their understanding was at a particular time.

If I am incorrect on that, then I will have to revise a substantial part of my questioning. Perhaps there is some written document they claim to be the final contract embodying all the terms. Is there?

The Court: I don't recall there being a written order. There is oral testimony about some order.

There is some document, I believe a colored piece of paper, which purports to be an acceptance.

The oral testimony, insofar as I can see the appropriateness of it now, is to clear ambiguities, to define the understanding of terms as they are used in that written acceptance, and state what the terms of the oral order were.

Now, I might be, as I often am, wrong in my understanding. If so, you may either give me authority or argue it.

Mr. Lydick: Well, I don't know at what date these people claim there was a contract. I can't tell from the pleadings when this contract is supposed to have been breached. And I can't tell from the

(Testimony of Leonard J. Mills.)

pleadings what the alleged terms of it are supposed to have been.

The Court: If there was a contract, and that is something upon which decision will have to be reserved until after the submission of the cause, I can tell you the date on which [194] I think it jelled into a contract, if it ever did that.

May I see the exhibits, Mr. Clerk, particularly that pink one.

The Clerk: Yes, sir.

The Court: Well, I can see now the pink one here is not it. It would appear to the court that if there was a contract entered into between these parties, that the offer was made sometime prior to Exhibit 8, and that the sending out of Exhibit 8 by Deering-Milliken on 3-14-52 amounted to an acceptance.

Mr. Lydick: Is that the theory of plaintiff?

The Court: That, I understand, is the theory. What the finding is, of course, is going to depend upon a lot of things. That is what he is arguing and what I gathered from the flow of testimony and documentary evidence up to now.

Mr. Lydick: I don't think that is the case, your Honor. I think you are confused, as I am.

May I ask the witness.

Q. (By Mr. Lydick): Is that the date you think the matter jelled into a contract?

Mr. Lincoff: Just a moment, your Honor please. I will object to that. I think clearly that calls for a conclusion. That is a matter that this honorable

(Testimony of Leonard J. Mills.)

court is going to have to determine after argument and/or brief upon submission.

The Court: That is probably so. However, I can't tell [195] for a certainty now but what the state of mind of the witness on that point is material. Hence, the objection will be overruled.

You might look over this Exhibit 8. I don't know, did I correctly state your contention?

Mr. Lincoff: Your Honor, according to our pleadings we have alleged that a contract was made on the 6th of March, 1952.

The Court: Then are you treating this memorandum of 3-14-52, Exhibit 8 as an offer, rather than an acceptance?

Mr. Lincoff: No, sir. I am treating that only as a confirmation of the agreement made on March 6th, as the result of a series of correspondence culminating on that date.

Mr. Lydick: In other words, the contract was entered into on March 6th?

The Court: Was this contract an oral one, one arising from the acts of the parties, or was it one of which there was a memorandum by putting together several of these exhibits?

Mr. Lincoff: That is exactly it, your Honor. And in our original opening brief we cited law with respect to that proposition. I think the case of *King vs. Stanley*, in California that you may have a validly executed and enforceable contract, based upon a series of memoranda and/or documents, and that that is the theory upon which we relied,

(Testimony of Leonard J. Mills.)

and that you need not have a formally drawn and technical instrument. [196]

The Court: I don't think counsel is arguing with you there. He says that the succession of documents and conversations here did not amount to a contract, as I understand it.

You are saying they did.

Mr. Lydick: When did they finally amount to one in your mind, on the 6th or on the 14th or on some other date?

Mr. Lincoff: Are you addressing that question to me?

Mr. Lydick: The witness or Mr. Lincoff. You, since you have interposed the objection. I think it is a fair question.

Mr. Lincoff: I have made my objection, and your Honor has ruled. I think it is up to the witness now to answer the question. I don't think the court can be bound by my interpretation at this stage.

The Court: I have not intended to state any theory the court is going on. The court is just sitting here wondering, up to now, but I did state what I apparently erroneously understood to be certain definiteness to your theory, which was not accurate.

Now, Miss Reporter, will you read the question?

(The record was read.)

The Court: I think perhaps I misstated what I understood your position to be. I don't understand that you are saying there was no contract.

(Testimony of Leonard J. Mills.)

Mr. Lydick: We are saying there was no contract.

The Court: You are contending that there was a different [197] contract than what the plaintiff contends?

Mr. Lydick: Our position is clearly there was no contract. We are trying to determine when the alleged contract was supposed to have come into being.

The Court: All right. Go ahead and explore further.

Q. (By Mr. Lydick): In your pleading, entitled "Complaint," Paragraph X thereof, page 4, may I read:

"That prior to the aforesaid 14th day of March, 1952, to wit, sometime during the month of January, 1952, plaintiff and the defendant Deering-Milliken & Co. Inc. had conversations wherein the plaintiff and the said defendant discussed the conditions, circumstances, terms and manner under and in which the said defendant might undertake and agree to manufacture or have manufactured and delivered to the plaintiff the said rayon cartridge cloth to be used by said plaintiff in the manufacture of the aforesaid ordnance items under and pursuant to the aforesaid contract of March 14, 1952."

That reference being to the contract with the Government.

"That said conversations, together with certain negotiations in writing were continued and carried

(Testimony of Leonard J. Mills.)

on by and between the plaintiff and said defendant until on or about the 6th day of March, 1952, on or about which said date a contract was made, executed and [198] delivered upon the terms and conditions hereinafter set forth."

Is that the contract you are suing on in this action, the one dated March 6, 1952?

A. I believe the contract that we have entered into as of March 6, 1952.

Q. Going back to my question that you testified that you knew a written order would have to be placed—that written order being placed by you—I ask again, did you or did you not know that the terms of that order and the terms of the acceptance thereof by Deering-Milliken would have to be reduced to writing and executed by both you and Deering-Milliken?

A. It is my understanding that prior to Mr. Piersol's giving me the letters confirming our contract, he had made the necessary inquiries with the proper people in New York and then given me those letters.

Mr. Lydick: May I have the question read?

(The question was read.)

The Witness: It is my understanding that when I came back to Mr. Piersol and said, "Mr. Piersol, Ordnance is ready and has the contract for me, they want confirmation from you that I have a contract with you," and that he made inquiry of New York and got authority to give me those letters that as of that moment we had a contract. But that is when

(Testimony of Leonard J. Mills.)

I [199] then committed myself to the Government.

Q. (By Mr. Lydick): Did you or did you not believe or did you or did you not know that your contract with Deering-Milliken would have to be reduced to writing?

Mr. Lincoff: I object to that, if your Honor please, on the ground it is immaterial. The question has been asked and answered.

Mr. Lydick: It has not been answered.

Mr. Lincoff: I think the answer was perfectly responsive to the question.

The Court: Overruled.

The Witness: Will you repeat the question?

Q. (By Mr. Lydick): Did you know that your contract with Deering-Milliken would have to be reduced to writing?

A. It was my belief that the letters that I received from Mr. Piersol were binding on Deering-Milliken.

Mr. Lydick: Would you read my first question again, please, Madam Reporter?

(The question was read.)

The Court: That rather assumes certain facts, and I think it is getting argumentative, what his understanding of a particular letter is.

Mr. Lydick: I am not talking about a particular letter, your Honor. I am just trying to inquire whether or not after two months of negotiations, inquiries, quotations, whether or [200] not he had learned enough about Deering-Milliken to know whether or not any final agreement he might enter

(Testimony of Leonard J. Mills.)

into with them would have to be reduced to writing.

The Court: I will ask a couple of questions and see if that will take care of it.

Did anyone from Deering-Milliken ever tell you anything to the effect of what counsel has just been asking?

The Witness: No, sir, not in so many words.

The Court: Well, in what words? Tell us the words then and we will——

The Witness: They didn't say anything as to what would be any particular form of contract that was required. It was my understanding, and knowing that if I received a letter that spells out an agreement, that they will do such and such a thing, that that in itself is an agreement and a contract in that sense.

The Court: Did they ever tell you an order would have to be signed in order to perform?

The Witness: No, sir.

The Court: Did they ever tell you you acted at your own risk unless you had an acceptance?

The Witness: No, sir.

The Court: Did they ever say anything to the effect, "Let's get together and write an agreement"?

The Witness: No, sir. [201]

The Court: Did they ever say anything in substance to that effect?

The Witness: No, sir.

Mr. Lydick: May I ask a question?

The Court: Yes.

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lydick): Did they tell you there were no options?

A. That is right, they did; no 30-day options.

Q. Did they tell you you could get any kind of an option from them, when you asked them whether you could get an option?

A. The time I inquired for an option was for a 30-day option, and Mr. Piersol said the mill would not tie up anything for so long a period of time, they were in no position to. It was in reference only to a 30-day option.

Q. Did he tell you that he would give you any kind of an option?

A. No. I didn't ask for any kind of an option.

Q. Did you, after this two months of discussions with Deering-Milliken,—and very intermittent, I understand, only a few inquiries and a few quotations—but did you by this time, that is, by this February 6th or 8th period know that Deering-Milliken was only a sales agent?

A. No, sir, I didn't.

Q. What did you think they were? [202]

Mr. Lincoff: Objected to as immaterial, your Honor. I think also——

The Court: Sustained.

Mr. Lincoff: ——the question has been asked and answered twice previously.

The Court: He is testifying to conversations and correspondence with that particular company. Now, unless there is some effort to hold an undisclosed principal to what is contended to be a contract, I

(Testimony of Leonard J. Mills.)

don't think it makes any difference whether he understood their position, as merely a sales agent, or broker, or whether he understood it to be that of the manufacturer, because liability, if any, is predicated upon whether there was a contract, not with what the character of the contracting party is.

Mr. Lydick: Well, I will accept your Honor's decision, of course.

The Court: You accept it during the noon hour then.

Mr. Lydick: The basic purpose of this examination is that I am trying to bring out some other things, during the entire examination that goes back to my opening address that the real basis for this entire misunderstanding grows out of the entire lack of understanding of this plaintiff about an industry he knows nothing about.

The Court: I don't like to sustain objections which, at the time of submission, appear to have been going into a line [203] which at that time we will have felt was beneficial, although presently we do not.

I will live with my decision until 2:00, or would you rather say 1:45? Then you may try again. The present ruling will stand, but we will say it was as to the particular question.

You can try again, if you want to, in a slightly different form. Will it inconvenience anyone to be here at 1:45?

Mr. Lydick: Nearly any other time would be all

right. I have a conference scheduled between 12:30 and 1:00.

The Court: Will 2:00 o'clock be all right?

Mr. Lydick: Yes.

Mr. Lincoff: May I inquire, pursuant to our understanding on Friday, Mr. Piersol will be available to follow Mr. Mills?

Mr. Lydick: Absolutely. Mr. Piersol is in his office awaiting a call at the present time.

There undoubtedly will be some redirect. In any event, he is on call.

I will tell you a few minutes before I intend to conclude, and if you don't anticipate any redirect we can call him then.

The Court: I am anxious to get this case concluded because we have this week's trial calendar, too. We expected originally to start yours the first of last week and instead we started it at the end.

Take whatever time is necessary, but I will appreciate it if one witness can immediately follow the other, so that, if possible, we can conclude this in another day or so.

Mr. Lincoff: Fine, sir.

The Court: We will recess until 2:00.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [205]

Afternoon Session, 2:10 p.m.

The Clerk: May we proceed, your Honor?

The Court: Yes.

LEONARD J. MILLS

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Lydick): Mr. Mills, we have been discussing the period generally of February 6th to March 6th. May I ask you to relate in your own words precisely what happened in the period immediately preceding March 6th?

A. During that period most of my efforts were in the negotiation of the government contract with the Ordnance Department in Pasadena. We were negotiating on price, which ended with a 10 per cent increase in my price.

The reason for that increase was based on the fact that I had only gotten the contract for the 105 mm shells, rather than on the combination of the 105 and 75 mm shells.

The Court: Did you have a regular formal written contract with the Government?

The Witness: No, sir. It was a formal written proposal is what they call a negotiated contract. Whereas, they were only considering me for the smaller portion of the entire [206] original proposal, they gave me to figure on, I felt I should ask them for an increase in price, which I secured.

The Court: When you came down to where you and the Government were on the basis of contracting, was it written up as a formal contract?

The Witness: Yes, sir. My negotiations with

(Testimony of Leonard J. Mills.)

Deering-Milliken at that time were on a status quo basis, based on the price they had submitted to me.

It was on approximately March 6th that the Government told me that I would—I have a contract with them, but they wanted evidence of a contract with Deering-Milliken, assuring—to assure them that I was able to secure the goods.

I then went to Mr. Piersol and told him I had a contract with the Government, and they wanted evidence from him showing that I was able to secure the goods from Deering-Milliken.

This resulted in a phone call by Mr. Piersol to Mr. Burns of the Ordnance Department, advising I had a contract with them and it was confirmed by a letter dictated by Mr. Piersol immediately after that phone call.

Q. (By Mr. Lydick): Just one letter, Mr. Mills?

A. No, sir, he wrote—well, one letter to the Ordnance Department to advise them that I definitely had a contract.

At the same time he dictated a letter to me confirming to me that I had a contract with Deering-Milliken. [207]

Q. Now, I believe it is correct that March 3rd was Monday. Do you recollect any negotiations with Mr. Piersol in the immediate days preceding this one of March 6th?

A. I am not sure of any negotiations exactly, I mean other than——

Q. Were you making any statements to him in

(Testimony of Leonard J. Mills.)

that period, March 4th and 5th, say, a couple of days just preceding?

A. I can't recall. I believe if you mention them to me I may remember whether I did or not.

Q. What was that last?

A. I say I can't recall of any in particular, but if you mention some you had in mind I could recall whether I did or I didn't, I believe.

Q. Did you have any conversation with him in that immediate period regarding some quotations on some widths, for example? Just a couple of days before March 6th, say, the 4th or the 5th.

A. I can't recall whether it was just before then or not.

Q. Do you have any recollection of any negotiations or requests or inquiries to Mr. Piersol regarding any new prices just immediately preceding the 6th, say, the 4th and 5th?

A. None other than those that I had secured.

Q. Do you recall giving Mr. Piersol any information with regard to credit on the days immediately preceding the 6th, say, the 4th and 5th? [208]

A. None other than the fact I secured a 90 per cent partial payment clause.

Q. You told him that? A. Oh, yes.

Q. Nothing else?

A. Nothing that I can recall.

Q. Do you recall closing your inquiring of Mr. Piersol at that time regarding any new delivery schedules? A. I spoke to Mr. Piersol.

Q. That is, immediately, one or two days imme-

(Testimony of Leonard J. Mills.)

diately preceding? I meant to qualify the question by saying in that immediate preceding period.

A. In the immediate preceding period there were negotiations with the Government and at the same time with Deering-Milliken, trying to get a delivery schedule that would jibe.

Q. You mean the period about the 4th or 5th of March?

A. Whether it was that close or not I don't know.

Q. I am limiting my examination for the moment to that immediately preceding period.

A. I can't recall.

Q. Do you have any recollection of any discussion with Mr. Piersol in this immediate preceding period regarding terms, that is, with respect to whether you would get 30 days, 60 days or 70 days terms or anything like that?

A. Yes, sir, the basis of the order at that time was [209] it would be a C.O.D. basis, you might say, or upon presentation of invoice and upon my securing the 90 per cent partial payment clause.

I discussed with Mr. Piersol my paying for it on the arrival of the goods here in Los Angeles, at which time the Government would give me full payment for the goods and I could turn it over to Deering-Milliken.

Q. This conversation was in this immediately preceding period?

A. Just about that time. I don't recall just when.

(Testimony of Leonard J. Mills.)

Q. You don't recall whether it was before or after?

A. It was in the immediate area, within two or three days of the 6th, one way or the other.

Q. Is it my understanding that you testified that you proposed to Deering-Milliken either immediately preceding or immediately after March 6th that you make payment on a C.O.D. basis or they said they would only consider payment on that basis?

A. I was perfectly willing and able to make it on presentation of invoice. I preferred making it on arrival of goods here, so that the Government could then give me the money, and I, in turn, turn it over to Deering-Milliken, Mr. Piersol.

Q. You have no recollection of asking for any extended credit terms at that time? [210]

A. Yes, I was asking for them to pay for it at the time of the arrival of the goods here, on arrival of bill of lading.

Q. By extended credit terms you meant 30 days terms or 60 days terms, or anything like that?

A. No.

Q. You didn't ask for anything like that?

A. No, because of the 90-day partial payment clause.

Q. You weren't interested in any long terms, such as 30 days or 60 days?

A. Not after I got the 90-day partial payment clause.

Q. And that was before March 6th?

(Testimony of Leonard J. Mills.)

A. Yes.

Q. Did you have any discussion with Mr. Piersol at this time with respect to whether or not the new quantity or any other features might require his checking the Military again or checking New York again?

A. No, sir. The only change that took place immediately after the 6th——

Q. Just immediately preceding is all I am interested in. A. I can't recall.

Q. On March 6th you say that you received two letters from Mr. Piersol, is that correct?

A. That is correct.

Q. Is that correct? A. Yes. [211]

Mr. Lydick: Could I have Plaintiff's Exhibits 6 and 7, Mr. Clerk?

The Clerk: Yes, sir.

Mr. Lydick: If it please the court, I would like to give the witness an opportunity to read both of these letters, to refresh his recollection. Then if the court would indulge me I would like the court to read both of these letters before we go ahead.

The Court: I will read anything you offer and is received in evidence at any time that either counsel think I should read it, in order to preserve a proper continuity.

Mr. Lydick: I think it would be better. I would like to have him read it and then you read it.

The Court: You had better get it into evidence before I read it.

Mr. Lincoff: It is in.

(Testimony of Leonard J. Mills.)

The Witness: Is there any particular order in which you prefer me to read this?

Q. (By Mr. Lydick): No. You go ahead and read them to yourself in any order you may wish.

Mr. Lydick: I don't believe I caught the court's inquiry with respect to getting these in evidence. You understood these are in evidence?

The Court: I am sorry. I did not understand that. I was suggesting they get into evidence before the court be [212] asked to read them.

Mr. Lydick: I believe these are, your Honor, Plaintiff's 6 and 7.

The Court: Thank you.

Q. (By Mr. Lydick): Would you care to have these before you while you are testifying regarding them? A. If I may.

Q. Certainly. Now, where did your conversation with Mr. Piersol immediately preceding the preparation of these letters take place?

A. At his office.

Q. Tell us what you told him and what he told you.

A. I called on Mr. Piersol and told him that the Ordnance Department has advised me that they—that I have a contract with them. They only desire to have confirmation of the fact I have purchased and secured the goods from Deering-Milliken.

I said Mr. Burns would like to have Mr. Piersol call him and advise him of that. Mr. Piersol did that while I was sitting there.

(Testimony of Leonard J. Mills.)

After the conversation Mr. Piersol then dictated these letters.

Q. Which one did he dictate first, the one that begins, "We understand from our conversation in this office that we have consummated a contract," or the one that begins, [213] "This will confirm our quotation of today"?

A. I don't recall which he dictated first. They both were dictated at approximately the same time.

Q. Did you assist him in the wording of the one that begins, "We understand from our conversation today in this office that we have consummated a contract"?

A. By assisting him you mean what, sir?

Q. Assisting him in the words, the phrasing of it.

A. Nothing other than I told him I needed one letter for the Ordnance Department, showing that I had—as evidence, I had entered into a contract.

Q. Mr. Mills, do you recall who else was present during the course of dictation of those two letters, if anyone?

A. I can't recall, other than I assume the girl that took the dictation was present.

Q. What did you say again was the purpose for obtaining the letters addressed, starting out, "We understand from our conversation today in this office that we have consummated a contract with you"?

A. That letter was written for the benefit of the

(Testimony of Leonard J. Mills.)

Ordinance Department, to show them that I had consummated a contract with Deering-Milliken.

Q. I see. What was the purpose of the other letter?

A. That was confirmation to me, that we had entered into a contract. [214]

Q. Turning then to that second letter, you state that that was written so that you would have written confirmation that you had a contract, is that correct?

A. That is correct.

Q. What were the terms of that contract?

A. That I would receive "101,200 yards of 45 $\frac{1}{2}$ -inch rayon cartridge cloth in the greige as per Government Specification PXS-1300 at 36 $\frac{1}{8}$ cents per yard and 23,900 yards of the same material in 47 $\frac{1}{2}$ -inch width in the greige at 37 $\frac{3}{8}$ cents per yard, both on terms of net 30 days, delivery to start in April and spread out to completion."

Q. Any other terms of that contract, as you recall it?

A. No, that is it.

Q. This is the correct price?

A. The correct price—that was the price for those widths, yes.

Q. Those are the correct widths?

A. They were subsequently changed.

Q. We are talking about this—this is as you stated, you stated this was the contract, now?

A. I believe it is.

Q. The correct quantities.

A. Yes, sir.

Q. Did it make any difference when delivery started in April, from your point of view? [215]

(Testimony of Leonard J. Mills.)

A. Yes, the confirmed—the actual delivery schedule was to be given to me by the Ordnance Department and I, in turn, was to give it to Mr. Piersol.

Q. But that didn't include how near your term was to start in April and spread out to completion?

A. That is correct, but it was approximately that time that the government contract would also take place. I mean that the government delivery schedule would take place.

The Court: Do you know of any document that is in evidence here which will tell us what Specification PXS-1330 would be?

The Witness: Yes, sir.

Mr. Lydick: It is in evidence, I believe, your Honor.

The Court: Which exhibit is this?

Mr. Lincoff: That is Exhibit 5, if your Honor please.

The Court: May I have Exhibit 5?

The Clerk: Yes, sir.

The Court: Thank you.

Mr. Lydick: May I proceed, your Honor?

The Court: Yes.

Q. (By Mr. Lydick): What do the first four or five words say? I believe you paraphrased that portion of it. What do they say precisely?

A. You want me to read that?

Q. Yes, the first four or five words. [216]

A. "This will confirm our quotation to you of today on 101,200——"

(Testimony of Leonard J. Mills.)

Q. That is correct. How does that language in any way differ from any of the quotations you received during the preceding two months and a half?

You had that written confirmation dated January 6th and another one on the 16th, I believe, one February 8th. How does this language differ in any way from that?

Mr. Lincoff: That is objected to, if your Honor please, on the ground that calls for a conclusion and opinion of the witness.

I respectfully submit that the documents will speak for themselves with respect to whether there is a similarity or dissimilarity.

The Court: That objection, I think, is good. I will have to rely on counsel to point out in the evidence what the contents of the various documents are wherein the similarity or dissimilarity is present.

Q. (By Mr. Lincoff): Will you read the last paragraph of that letter, Exhibit 7?

A. "We are teletyping your order for these goods to our home office tonight subject to your receipt of the contract from the Government; and, of course, the whole thing is predicated on our ability to handle the business when you are in a position to [217] confirm it."

Q. What did you say and what did Mr. Piersol say with respect to that letter?

A. The only thing——

Q. You understand we don't want your conclu-

(Testimony of Leonard J. Mills.)

sions. Your counsel will object to that. Say what you said and what he said.

A. I am not able to recall what conversation passed regarding this. I know what was in my mind and I feel sure I know what was in Mr. Piersol's mind when this was written.

Q. What was in your mind?

A. This was a confirmation to me I had a contract with Deering-Milliken.

Q. That last paragraph, that is what it meant to you?

A. Yes, that is right. That is right.

Q. Will you read it aloud for me?

A. "We are teletyping your order for these goods to our home office tonight subject to your receipt of the contract from the Government; and, of course, the whole thing is predicated on our ability to handle the business when you are in a position to confirm it."

The only confirmation that stood out there was only on the delivery schedule. In other words, the order for the goods and everything was all set except the exact delivery [218] schedule days were to be confirmed by the government contract.

Q. Now, about credit——

A. There was no question on credit, other than as to the terms of how I would pay for it, whether it would be on receipt of the bill of lading, that is, of the goods here on presentation of invoice.

Q. This says, "* * * both on terms of net 30 days."

(Testimony of Leonard J. Mills.)

A. There would be approximately 30 days between the time the goods was shipped and the time they arrived here. There would be about two or three——

Q. Is that what that 30 days means to you?

A. That was the 30 of the lag between the time of making out the invoice at the mill and the time it would reach here.

Q. Your testimony is that the terms of net 30 days meant some 30-day lag in the delivery and not as it might be as a customary meaning in the trade.

A. 30 days means 30 days from the date of invoice. The invoice is made out at the time the goods is ready to be shipped at the mill. These goods are coming by boat. There could be—almost, there wouldn't be in this case; I know it was going to be less than 30 days. It was going to be about three weeks. There could be that difference between the date of invoice and the receipt of goods here in Los Angeles.

Q. That is what this meant? [219]

A. That is right. I, on top of that, had requested—I had requested the 30 days, when Mr. Piersol suggested——

Q. You had requested the net 30 days terms?

A. That is right.

Q. I thought you just testified a few moments ago it was always C.O.D., so far as you were concerned, because of your 90-day payment clause, it didn't make any difference to you.

(Testimony of Leonard J. Mills.)

A. No, you are mistaken. C.O.D. was what Deering-Milliken wanted. In other words, C.O.D., date of invoice there.

Q. When did they ask you for——

A. Beg pardon?

Q. When did they ask you for that, before or after this letter?

A. No, they asked me for that after this letter.

Q. So that the credit terms hadn't been agreed on by anybody at that time. This was just another proposal, more or less, before you got any credit, at any rate?

A. No, sir, at the same time these letters took place Mr. Piersol requested I call Mr. Smith, the credit manager of Deering-Milliken, in New York.

Q. This was on March 6th?

A. Oh, approximately—no, it wasn't on March 6th, but right in that period. [220]

Q. Before or after?

A. I am not sure, but it was right in the interim——

Q. But it wasn't at the same time?

A. No, not while I was sitting there. He asked me to call Mr. Smith and explain to him just what the 90 per cent partial payment clause meant with the Government, so that I could secure these 30-day terms, or upon receipt of goods here in Los Angeles.

I called Mr. Smith. I explained to him that 90 per cent partial payment clause meant that the Government was going to give me the entire amount of the invoice of the goods that would arrive here,

(Testimony of Leonard J. Mills.)

upon its arrival here. They would also give me all my direct labor costs, 100 per cent of my direct labor costs each week, up to a total of 90 per cent of the entire contract.

Mr. Smith then agreed that if I would give them an advance payment of 10 per cent of the entire contract they would then go along on this basis of that, upon receipt of goods here.

I passed that information on to Mr. Piersol and that is what brought on the payment of the 10 per cent, of my check for 10 per cent of the total contract.

Q. When was this you had this conversation with Mr. Smith, in relation to this March 6th letter?

A. I believe it was approximately the 10th or 12th of [221] March, now I recall the sequence of events with the letters and such.

Q. Four to six days later?

A. That is right.

Q. You at the time these letters were written agreed with the Government on all the important terms of your contract with them, quantity, and price, advance payment clause, delivery?

A. That is right.

Q. Had your government contract yet been reduced to writing?

A. The advance copy of the government contract was received by me on the 10th of March.

Q. Then it hadn't been reduced to writing?

A. The terms had been laid out and it was a matter of sending them to me. It was a matter of

(Testimony of Leonard J. Mills.)

sending it to me after the 6th of March; I received it about the 10th of March.

Q. They required that you get some letter from Mr. Piersol to show you could get the goods before they would give you the contract?

A. That is right.

Q. They weren't going forward with it unless you got something from Mr. Piersol to show you had a source for these goods?

A. That is what Mr. Burns requested of me.

Q. Turning to the other letter, the one that starts out that, "We have consummated a contract," which has as its last sentence, "This memo is written with the idea of submitting it to the Government Procurement Office."

At whose request was that sentence put in the letter, at yours or Mr. Piersol's, or was it at anyone's request?

A. To the best of my recollection this was requested by the Ordnance Department and it was—that was why this letter was written, so that I, in turn, could bring it over and give it to the Ordnance Department.

Q. So you told Mr. Piersol, after you put it in the letter—

A. Mr. Burns may have told him that on the phone, too.

Q. But you told him, also?

A. I may have. I may not. I don't recall any exact conversation. The Ordnance Department wanted it, and I, in turn, then wanted it.

(Testimony of Leonard J. Mills.)

Q. Was there any price set out anywhere in that letter that ends that way and begins, "We understand from our conversation today in this office we have consummated a contract"?

A. No, because this was a letter to advise the Ordnance Department I had entered into a contract with Deering-Milliken. It was not required to stipulate what price I was paying for the goods.

Q. Did you tell Mr. Piersol that and that is why he [223] left the price out of that one?

A. I imagine so. I imagine Mr. Piersol must have realized it. In other words, all that was requested of Mr. Piersol was confirmation to the Ordnance Department of the fact I had a contract with Deering-Milliken.

Q. All you needed before the Ordnance Department would go ahead and give you your written contract?

A. That is right, and this letter confirms the fact I have a contract with Deering-Milliken.

Q. So you could go and get your written contract from the Government? A. Yes.

Q. In your cost quotations to the Government, Mr. Mills, had you included a figure showing the cost of the goods? A. Only in total.

Q. The total amount?

A. Total dollars and cents.

Q. Do you remember what that figure was?

A. I could get it from my files.

Q. Do you have copies of your cost proposals to the Government?

(Testimony of Leonard J. Mills.)

A. I have a breakdown of my cost proposals, of my proposals of the entire contract.

Q. Is this something you made up since the trouble with Deering-Milliken began or something you made up and presented [224] to the Government?

A. I had computed those costs before I submitted it to the Government. I made a compilation of those various——

Q. Do you have a document made up prior to March 6th and any time prior to that, or any time prior to March 1st? A. No.

Q. You can't tell me the original price you quoted to them? A. The total amount?

Q. Yes. This is on the goods.

A. About \$45,000.00, approximately.

Q. You are sure you didn't leave the price out of this letter and it was because you were determining it to be quite a bit less than you told the Government you were going to get it for?

A. I didn't think it was any of their concern. They only wanted confirmation of the fact I had a firm order from Deering-Milliken. This letter was only to submit that as evidence to the Ordnance Department.

The Court: Your compilation you furnished the Government, did that show the parts of each component, either of labor or materials that would go into the finished product?

The Witness: Yes. It shows a breakdown, the

(Testimony of Leonard J. Mills.)

dollars and cents the rayon was going to cost. That would cost forty-five thousand some-odd dollars.

The thread was going to cost me—the figure submitted to the Government in the original proposal included the thread; that was a couple of hundred dollars or less.

And the rayon and the total figure—in other words, the cost of the material used in manufacture amounted to so much in dollars and cents.

The Court: Did you keep a copy of it?

Mr. Lincoff: Your Honor, I have a summary of all those costs in my files.

The Court: Well, what we want to know, though, is not what summary you might have today, but what summary you gave the Government at the outset of these——

The Witness: When I submitted the proposal to the Government, they gave us just enough copies to submit to them for their consideration.

When I didn't get the proposal on the 75 mm shells, for example, they returned it with a letter advising me of that, my proposal on the 75 mm shells.

But on the 105 they never returned it to me. They called me on the phone, that I was being considered for this, and we went into further negotiations and they had those papers at all times and still have them, I believe.

Q. (By Mr. Lydick): You never had a copy of them?

A. No. I had no copy to keep, other than what

(Testimony of Leonard J. Mills.)

papers I submitted to them at the end. I did have figures of each [226] particular operation, from which I compiled my figures which I submitted.

Q. That you made up at that time?

A. That I made up at the time I submitted to the Government——

Q. Do you still have those?

A. I had those on the sheet I submitted to you yesterday.

Q. You said those were made up long after March 21st. I want the figures you had at the time you were dealing with the Government, papers with those figures on them.

Mr. Lydick: Our problem is this, your Honor: As both Mr. Lincoff and I know from our pretrial stipulation, the United States has indicated they are going to refuse to bring in their files on this case because they are confidential.

As a result, it is very important we try to get anything in writing that Mr. Mills has, that he made up before March 21st. Any copy of any kind of a writing with respect to his negotiations with the Government and the quotations he made up before March 21st.

Q. (By Mr. Lydick): I take it you don't have any of those?

A. I have figures I mentioned. Mr. Lincoff has those.

Mr. Lincoff: I have here, and I think I have advised Mr. Lydick I have here, the form of proposal and all the [227] correspondence pertaining to the

(Testimony of Leonard J. Mills.)

liners of the 75 mm cartridges. This is the one, of course, as the witness has testified, which was not awarded to him.

Consequently, as the letter of transmittal here would indicate, they were returned to him. If your Honor would want to see, solely for the purpose of seeing the details required to be furnished, I will be very happy for you to see it. We have no objection.

The Court: The nature of the form, and those things, have been so directly in my knowledge, when I held other positions than the present,—

Mr. Lincoff: Surely.

The Court: —I don't think it is necessary. I don't see that it is necessary to bring in any more information, as to the type of forms, for me, unless it has some direct bearing in the case. I can appreciate some counsel wanting to have something that was made, some calculation or record of calculation which was made contemporaneously with or preceding the submission of those figures to the Government.

It used to be people would come into the United States Attorney's Office, while I was employed there, and say, would want a subpoena on the ground that some documents they needed were considered confidential.

And many times I have seen the representatives on such occasions enter into some kind of working agreement with the [228] parties, the other side, and try to arrange it so that the record could be

(Testimony of Leonard J. Mills.)

made available for the purpose of either a conference or litigation and then to return them, and in that way they were not made available to the general public. I think possibly that procedure would still be available. And something might be worked out.

Mr. Lincoff: I know Mr. Lydick tried it, he was there 24 hours before I was. We were out at the Department of the Army, Ordnance District, Pasadena. I spoke with Mr. Burns and Mr. Wegner, who apparently is the legal officer in charge, and I spoke with Colonel Bready. Up and down the line we were advised that none of the correspondence and none of the files would be made available. They had no independent recollection with respect to matters and they would not release the documents until the proper authority was given in Washington.

As Mr. Lydick said, in all probability it contained classified material that couldn't be made available. We discussed it. I think Mr. Lydick was there on Tuesday and I was there on Monday. We came to the conclusion we had generally been given the same type of treatment up there.

Anything that will facilitate the production of the Government's files, we are perfectly happy to go along with, that will sustain the complaint insofar as we allege as to the cost and what our profit would be.

Mr. Lydick: I will accept the offer and we will call [229] and see if Mr. Wegner, the legal officer,

(Testimony of Leonard J. Mills.)

will produce the files on the basis of such stipulation between the parties.

I think it is pursuant to a manual he uses, which says he shall produce no files unless he gets authority from Washington. I doubt if a stipulation from Mr. Lincoff and I will get any files. That is why I have been trying to see if Mr. Mills had anything in his file that he might have made up prior to March 21st, which indicates any other figures he quoted to the Government or the dates on which he quoted them.

I will go ahead with my testimony.

The Court: With the witness' testimony?

Mr. Lydick: Yes.

Q. (By Mr. Lydick): Tell me, Mr. Mills, about the discrepancy in these two letters with respect to delivery. I note in the letter which was written for the purpose of the Government, it says, "Delivery on both items to start the week end April 25th," and yet in the one starting, "This will confirm our quotation," it says "Delivery will start in April and spread out to completion."

Was there anything insignificant as to the April 25th date?

A. No, sir. I think that was approximately the date that was contemplated that the thing was to start.

Q. Contemplated by whom?

A. By both Mr. Piersol and the Government, and so on. In other words,—— [230]

(Testimony of Leonard J. Mills.)

Q. Mr. Piersol, I take it as to him there hadn't been any agreement on delivery schedule yet?

A. There had been, but we were waiting for the confirmed contract from the Government, which was received two or three days later after this letter.

Q. This one goes on to say, to the Government, "We hope to be able to arrange shipment of these goods to completion 1/6 of each width every two weeks." And yet there is nothing about that at all in the letter between yourself and Mr. Piersol starting, "This will confirm our quotation."

A. It was understood. Even the final terms that we had arranged with Mr. Piersol, they were to be delivered in six shipments every two weeks.

Q. When were those final terms arrived at?

A. They were arrived at at that time. All future correspondence with Deering-Milliken supports that.

Q. That was the time that that was arrived at? What was the agreement again?

A. That they would make a shipment every two weeks, of approximately one-sixth, every two weeks.

Q. And that agreement was arrived at on March 6th?

A. That is right. Our contract was consummated in its entirety. There was no doubt in my mind and I am sure there was no doubt in Mr. Piersol's mind, until he was instructed otherwise. [231]

Q. Mr. Piersol will be on the stand and he can tell what was in his mind.

A. Until he had a definite contract with the Gov-

(Testimony of Leonard J. Mills.)

ernment,—I went and obligated myself to the Government based on that fact.

Q. I know that is your contention. This language such as “the whole thing is predicated on our ability to handle the business when you are in a position to confirm it.”

You can't tell me what Mr. Piersol meant by that. But can you tell me what your understanding of the meaning of that language was?

A. As soon as I had the delivery schedule from the Government, reduced to writing, Mr. Piersol would then confirm delivery schedule on it.

Q. That is what those words, when read, meant to you? A. That is right.

Q. The words “to your receipt of the contract from the Government” had no meaning with respect to the written contract you knew you had to get from the Government?

A. The Government, I was certainly convinced and there was no question, I believe, in the Government's mind or my mind but that the contract was there.

It was told to me I had the contract as soon as I could produce evidence I had a contract with Deering-Milliken. Immediately upon my producing that evidence in the form of [232] this letter Mr. Burns immediately set the wheels turning to get the written contract to me.

Q. What did these words mean, “We are tele-typing your order for these goods to our home office

(Testimony of Leonard J. Mills.)

tonight subject to your receipt of the contract from the Government”?

A. That was the delivery schedule.

Q. That was the delivery schedule?

A. Yes, just the delivery schedule as to when the mill would start shipping the first shipment and each subsequent shipment.

Q. That was the delivery schedule. I thought the sentence, or, the remainder of that paragraph was what you testified was the delivery schedule, “of course, the whole thing is predicated on our ability to handle the business when you are in a position to confirm it.”

What did that mean?

A. That meant in case there was too much of a delay between the Government giving me a delivery schedule and the time we submitted it to the mill, that the mill may not be able to clear it, but that never came to pass. The mill was able to deliver it when it got its confirmation.

Q. It was?

A. Yes, it was, because of the correspondence we got from it, and because of the fact that they requested the 10 per cent check on the thing which was further evidence of it [233] because——

Q. What was the 10 per cent check for again?

A. As an advance payment on this contract.

Q. Advance payment for a specific amount of the goods? A. That is right.

Q. We will get to that later. Isn't it a fact that

(Testimony of Leonard J. Mills.)

that was truly a deposit to guarantee your performance of any contract they might enter into?

A. Mr. Smith, after discussing it with him and explaining to him I was getting this partial payment clause from the Government, then as security for Deering-Milliken, he felt if I would pay for the last 10 per cent of the quantity of the goods, in other words, the last 10 per cent that would be shipped to me, in advance, that would be security enough to Deering-Milliken that I would abide by all the entire contract.

Q. So as a deposit, as security for your performance of any agreement, before they would enter into it——

A. I carefully worked it out with him, it would be in payment for the last 10 per cent of the goods.

Q. It would be applied as payment and they would keep it in their possession and apply it as the last——

A. No. The check and everything, the agreement, everything was drawn out. This was in payment for so many yards that amounted to the last 10 per cent of the goods to be shipped to me. [234]

Q. You put that on there?

A. That is the terms I specifically worked out with Mr. Smith. I don't think that is of any materiality, any material consequence, but that was the terms. In other words,——

Q. When were you supposed to deposit that check, as long as we are on the subject?

A. Upon request.

(Testimony of Leonard J. Mills.)

Q. Upon request?

A. Upon request of Deering-Milliken.

Q. Are you sure it wasn't supposed to be deposited with the written contract?

A. No, sir, it wasn't.

Q. As long as we are on this conversation with Mr. Smith, you are sure the name was Smith?

A. No, sir, I am not sure. Mr. Lincoff gave me the name as being Mr. Smith, that was the credit man. I wasn't sure at the time he mentioned it to me.

I believe he got it from the deposition or some place there. I am not at all sure. But it was the credit man that Mr. Piersol requested me to call.

Q. You were present at Mr. Piersol's deposition, so you wouldn't have had to get anything like that. In other words, you don't remember the name of the man you talked with in New York?

A. No, sir, other than the fact he was the credit man. [235]

Q. You don't recall his name?

A. No, but Mr. Piersol requested me to call him and gave me his name at that time.

Q. But it wasn't necessarily Smith?

A. No, sir. It may not have been.

Q. You are definitely certain this 10 per cent deposit wasn't to be made at the time you got the written contract for signature and returned to them with the written contract for signature?

A. No, sir, because my conversation with Mr. Smith had already—after I entered into a contract

(Testimony of Leonard J. Mills.)

with Deering-Milliken, my conversation with Mr. Smith was only on the basis of payment.

Q. What you mean was that was a conclusion, as counsel pointed out to you? You mean it was after March 6th? A. That is right.

Q. This all took place with respect to these letters in Mr. Piersol's office on March 6th?

A. I missed that.

Q. These two letters of March 6th were both written in Mr. Piersol's office in your presence?

A. That is correct.

Q. The originals of them were given to you that day? A. That is right.

Q. Did he telephone to anyone while you were in the [236] office? A. Mr. Burns.

Q. Anyone else?

A. Not that I can recall.

Q. Were there any discussions of seconds at the time you were discussing these two letters?

A. I am sorry. Discussion as to what?

Q. Of seconds.

A. There were discussions of seconds. I don't recall just when they took place.

Q. Do you think they were at the time these letters were being discussed, or before or after?

A. I am not at all sure. I know that I understood the basis of the seconds—I understood them at that time, and how much before that time I don't know.

Q. You don't know whether those discussions took place that day or before or afterward?

(Testimony of Leonard J. Mills.)

A. It must have been before. I am not at all sure, because I was fully aware—no, it was before, because I was fully aware of the situation on seconds when I figured my costs with the Government.

Q. Oh, you were? A. Yes.

Q. Was there agreement on the method of shipment at the time that you had these March 6th discussions? [237] A. Yes, sir.

Q. Why weren't they included in the letters?

A. Because those would be instructions that Mr. Piersol would forward to New York and give the mill instructions as to how they wanted it shipped the first time.

Q. It wasn't important to you that be in that contract?

Mr. Lincoff: I object to that, if your Honor please, as calling for conclusion and opinion.

The Court: Sustained.

Q. (By Mr. Lydick): What were your discussions regarding shipment at that time? Just what was said by you and what he told you.

A. It was understood the first shipment would come——

Q. I want to know what was said by you and what was said by Mr. Piersol. I don't want to know what you understood.

A. I told Mr. Piersol that the first shipment should come by rail, so I could start immediately in order to meet that first delivery date that the Government wanted.

Q. This was on March 6th?

(Testimony of Leonard J. Mills.)

A. This was prior to March 6th. Always, whenever we discussed it, we would discuss we were trying to get the Government's date——

Q. I want your discussion regarding shipment; what you told him and what he told you.

A. I don't recall what we—— [238]

Q. Did you have any discussion?

A. We had discussion, but I don't remember whether it was this word or that word just that day. I can tell you what we discussed.

Q. On March 6th?

A. It may be a few days one way or the other.

Q. Can you tell me if you had any discussion with reference to method of shipment at all on March 6th?

A. I cannot recall whether it was on that day.

Q. Can you tell me why this was not included in either of these letters?

Mr. Lincoff: I object on the grounds previously assigned, your Honor.

Q. (By Mr. Lydick): If you know.

Mr. Lincoff: It call for the opinion and conclusion of the witness.

Q. (By Mr. Lydick): Do you know why it was not concluded in either of these letters?

The Court: He has put a modified question and I think it is proper.

The Witness: Because it was understood——

The Court: That question may be answered yes or no, do you know.

(Testimony of Leonard J. Mills.)

Read the question.

(The question was read.) [239]

The Witness: No, I do not.

Q. (By Mr. Lydick): You don't know now?

A. I don't know what, sir?

Q. You don't know whether it wasn't included in either of those letters? A. That is right.

Q. What was the purpose of this other letter, again, this one that started out, "This will confirm our quotation to you today"?

A. That was confirmation to me of the contract I had with Deering-Milliken to procure those goods from them.

Q. Did you make any objection at all to the language of the first sentence, "This will confirm our quotation"? A. No, sir, I did not.

Q. Did you sign anything this day, with either the Government or Deering-Milliken?

A. I cannot recall whether I signed anything on that particular day.

Q. What is your best recollection, that you did or you did not?

A. I can't recall whether anything was signed on that particular day.

Q. Do you have any recollection of signing anything?

A. I don't have any recollection one way or the other, frankly. [240]

Q. Do you have anything in your files that indicated you signed anything that day?

A. I do not believe I have.

(Testimony of Leonard J. Mills.)

Q. Did you ever send anything in writing to Deering-Milliken?

A. Nothing that I can recall at this moment.

Q. Are you aware that contracts for the sale of goods in the amount of \$500,000.00 must be in writing?

Mr. Lincoff: Objected to, if your Honor please, on the ground it calls for a conclusion of law. This man has not been qualified as an expert in the law with respect to Section 1624 of the Civil Code.

The Court: Sustained. It is a question of law for the court and for counsel to treat in argument. It seems there has been a great deal of argument with the witness, and we are making very slow progress. We approach the end of the second day of this trial and we are still with the first witness, in a case we originally estimated would require a day to a day and a half to try.

You have now had a day and a half, and the first witness is not finished yet. I would like to have counsel let me know how long it is going to require to finish this case.

In reliance on that original estimate—I can't remember whose it was, one of the counsel in the case estimated that at the time it was set. I would like to know how much longer it [241] is going to take to try this case, because the court does have other commitments which were made in reliance upon the probable duration of trial.

If we can't finish it within fairly short order we will have to try it partly and then recess it to an-

(Testimony of Leonard J. Mills.)

other day, to complete it, which is an unsatisfactory thing. Having been in session for an hour this afternoon, we will now take a short recess.

(Short recess taken.)

Mr. Lydick: Your Honor, with respect to the time which we estimate will be required for the trial of this matter, we conservatively estimate at least two days and a half more will be required.

The Court: Two days and a half after today?

Mr. Lydick: Conservatively speaking—our estimate would include today—two and a half days. Most of that time, according to Mr. Lincoff's estimate, would be mine; about six and a half or seven hours will be mine.

The Court: All right. We will do what we can to get it through, without too much delay for counsel, but I am not going to delay the Ortiz case. It is a jury case which has been delayed several times and it concerns subject matter I don't think we can equitably delay longer.

So we will proceed with this case.

Q. (By Mr. Lydick): Mr. Mills, moving on from the date [242] these two letters were written, March 6th, what happened, if you recall, or did you have any further conferences with Mr. Piersol during the ensuing week?

A. On approximately the 10th of March I received the advance copy of the government contract, and advised Mr. Piersol immediately I had the advance copy of the government contract.

Q. Did you receive this with a covering letter?

(Testimony of Leonard J. Mills.)

A. Yes, sir, I believe there was a covering letter.

Q. Do you have that letter?

A. Mr. Lincoff may have it. I am not sure of the covering letter, but I remember receiving the contract about the 10th of March.

Mr. Lincoff: In the interest of saving time, I will look for it, Mr. Lydick, and if I come across it I will bring it to your attention.

Mr. Lydick: If it is not brought to my attention I assume you don't have it?

Mr. Lincoff: Yes. You are talking about the——

The Witness: Advance copy of the contract.

Q. (By Mr. Lydick): I don't know what the advance copy means. Will you tell me what that means? Is that the one you ultimately signed that is in evidence here?

A. No, that is the final contract.

Q. When did you receive the final contract?

A. I am not sure of the date, without looking at it to refresh my memory.

Q. Anyway, you recall definitely that it was March 10th that you notified Mr. Piersol you had received the advance copy? A. That is right.

Q. What did you do with the advance copy?

A. I had the advance copy here.

Q. All right. Now then, when was it you received the copy that you signed?

A. I am not sure of the date. It was shortly after the 10th, when I received the advance copy.

Q. Could it have been within three or four days?

A. Possibly.

(Testimony of Leonard J. Mills.)

Q. Perhaps the 14th? That was a Friday.

A. I am not sure of the date, without looking at it. It is here. We can easily get that point by looking at it.

Q. By looking at the contract you can tell me what date you received it?

A. I believe so.

Mr. Lydick: Exhibit 12, Mr. Clerk.

The Clerk: Yes, sir.

Q. (By Mr. Lydick): Can you tell me now when you received that?

A. Approximately the 14th of March.

Q. Approximately the 14th of March. During the period [244] March 6th and March 14th, had you had any discussions with Mr. Piersol, other than those you have already testified to?

A. I believe it was in that—just about that time that I asked Mr. Piersol whether it wouldn't be, whether it wasn't satisfactory to, instead of buying two widths, such as the letter of March 6th indicates, to buy all this one width, and he said there was this question about that it would be satisfactory.

Q. Did he confirm that in writing?

A. I believe it was confirmed by the memorandum of order, if I am not mistaken.

Q. I see. Did you have any credit discussions during this period, March 6th to March 14th, with anyone of Deering-Milliken?

A. Yes. That is when I spoke to the credit man whose name I am not sure of.

(Testimony of Leonard J. Mills.)

Q. It was during that period, March 6th to March 14th, that you talked with the credit man in New York? A. It was right in that time.

Q. Did you have any discussions regarding samples during that period?

A. It wasn't for samples. That wasn't the correct term. But just——

Q. Samples of the goods you were buying?

A. There wasn't talk about samples. We didn't request [245] any samples of the goods in that sense. I think what you may be referring to, Mr. Lydick, is Colonel Heath of the Ordnance Department called on me about the 10th of March and said they would need a pilot run of these liners, consisting of 100 units, which would require some fifty yards or less than fifty yards, which they would have to send to Joliet, the Ordnance Department in Joliet for analysis.

I called Mr. Piersol and we had a discussion as to whether the mill would be able to furnish me such a small quantity of goods without—before they run the order.

Mr. Piersol said he would contact his New York office and see if they could furnish me with those 50 yards.

Q. You think that was during this period, March 6th to March 14th, to the best of your recollection?

A. That is about right. It was just about that time.

Q. Did you have any further discussion regarding seconds during that period?

(Testimony of Leonard J. Mills.)

A. None, other than I can recall it was explained to me—you mean just during that period?

Q. Yes. A. I don't recall any.

Q. You believe you executed the government contract on March 14th, as you said, or around that time?

A. That is correct. I signed the final copy.

Q. Did you have any contact with Mr. Piersol at that [246] time?

A. I believe I have mentioned all the facts which required my contacting him. I believe there was further discussion about that particular 50-yard piece of goods.

Mr. Piersol called me and said he got word from New York office they were sending the goods to Colonel Heath of the Pasadena Ordnance Office, in error of sending it to me, because when he sent them the TWX he explained, he said that Colonel Heath of the Pasadena Ordnance Office required a 50-yard amount of goods.

He advised they were sending that piece of goods direct, which was in error. And I called Colonel Heath and told him he was going to get that 50-yard piece and to advise me he got it.

Q. Did you have any conversation with Mr. Peirsol with respect to your having signed your contract with the Government on March 14th? Did you have such conversation?

A. I believe I told him that I signed the—I signed the contract. I am not sure whether I mentioned it to him then or just that I received the

(Testimony of Leonard J. Mills.)

advance copy on the 10th. My memory is not sure on that point.

Q. Isn't it a fact that on March 14th you called Mr. Piersol and told him you had signed the government contract and he now could send in your order?

A. I will not deny the fact I may have told him that, [247] but my order had gone in prior to that.

On March 14th I received the memorandum of order from Mr. Piersol, which confirms the fact that the contract was let even before the 14th.

Q. In your mind it confirms it, you mean. Is there anything on the memorandum that says that?

A. The memorandum of order is—it is my opinion that the memorandum of order is confirmation, further confirmation of the fact that a contract has been entered into.

Q. We will get to the memorandum in a moment, Mr. Mills. After the signing of your contract with the Government, did you have any contact with any of your other suppliers?

A. Only regarding that 50-yard piece.

Q. Now, your other suppliers, not Deering-Miliken.

A. You mean as for the thread and such?

Q. Thread, packaging material.

A. I had the price on it. They had it on price. The packaging material was any size box that would be approximately that. There was no particular advance order required on that merchandise.

(Testimony of Leonard J. Mills.)

Q. You had no correspondence with any of these other people, the thread people?

A. They were all local sources that were available.

Q. Isn't it a fact that on March 14th you told Mr. Piersol that you wanted to place an order and gave him at [248] that time the new single width?

A. It may have been March 14th they changed the width. However, the order had been placed at the time of March 6th.

Mr. Lydick: Plaintiff's Exhibit 8, could I see it?

The Clerk: Yes, sir.

Q. (By Mr. Lydick): Isn't it a fact that on that date you told Mr. Piersol you wanted delivery to be made one-sixth every two weeks starting with the earliest possible date, but not later than April 18th?

A. It may have been so. I don't recollect exactly.

Q. Isn't it a fact that at that time you told him that you wanted the earliest possible Arrow Line sailing from Charleston, South Carolina, starting time not to be later than April 18th and earlier, if possible?

A. That may have figured in my calculations. I don't remember at this point whether that was the calculation then. I know the shipment by boat was figured to arrive at approximately the time I would need the second shipment. The first shipment was coming by rail and the second shipment by boat to tie in with my need for that second shipment.

(Testimony of Leonard J. Mills.)

Q. But those matters weren't mentioned in the March 6th letter, they were mentioned in writing for the first time, so far as you know, in the March 14th memorandum of order?

A. They were mentioned in our conversations. They may not have been in that March 6th letter.

Q. Isn't it a fact you told him on that date, March 14th, that your credit arrangements with the New York credit manager was 10 per cent deposit with contract?

A. I explained to Mr. Piersol my conversation with Mr. Smith. I pointed out to him it may have been March 10th. It was approximately that time. I pointed out to him I had arranged with Mr. Smith I was to give him 10 per cent in payment for the last 10 per cent of the goods.

Mr. Piersol noted that carefully and he was pleased with it, as well as I was, the basis on which we would make payment.

Q. Isn't it a fact that you told him at that time that you wanted the goods shipped in bales?

A. That is correct. I don't know whether it was then or before, but I did want them shipped in bales.

Q. Well, I am sorry to have to extend the cross examination, but do you know when it was that you first told him you wanted it shipped in bales?

A. I am not sure. I mentioned—I remember Mr. Piersol discussing it with me, whether I wanted it in rolls or bales, and we decided bales were more satisfactory; that is, I decided bales were.

(Testimony of Leonard J. Mills.)

Q. Would it have been on March 14th you discussed that for the first time?

A. It may have been. It may have been prior to that.

Q. Do you think you discussed it on March 6th?

A. I am not sure. It was not of very great consequence, so long as the mill knew in advance the way we wanted it.

Q. Didn't you subsequently change that and ask it be shipped in rolls?

A. I may have done it. It was of no consequence, so long as the mill knew it before they started putting the material up.

Q. Now, Mr. Mills, I show you what I understand you say was the contract you made with Deering-Milliken, the March 6th letter, with the price in it and all of that, and the March 14th memorandum of order.

I ask you whether or not they differ as to the quantity?

Mr. Lincoff: If your Honor please, I object on the ground that here again this is calling for the conclusion of the witness with respect to documents which speak for themselves.

I might add that the best evidence, whether again there are similarities or dissimilarities, may be ascertained from an examination of the documents.

The Court: Unless it is contended there is an ambiguity in language and such is pointed out to the court, so we can see it, I think the objection is well taken.

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lydick): Did you tell Mr. Piersol at this time that the minimum width was particularly important to you, 45½-inch minimum width was particularly important to you? [251]

A. I discussed with Mr. Piersol whether it would be possible to have just one width instead of the two widths. There was no question in my mind that it was satisfactory, because it made no difference to the mill, I was sure.

He said no, it made no difference so long as—whichever width I wanted.

I said, “I think I prefer having the 45½-inch width.”

The reason for that change, if you wish to hear it, was so that there wouldn't be any confusion as to what quantity to get in each width in each shipment.

I decided to work with only one width, 45½-inch width.

Q. Now, I ask you again: Did you ask Mr. Piersol to tell Deering-Milliken that it was particularly important that it be not less than 45½ inches?

A. I don't think it was necessary to tell him that. I just told him I would prefer the 45½-inch width.

Mr. Lydick: Well, will you read the question?

Q. (By Mr. Lydick): Will you see if you can answer it yes or no?

Mr. Lincoff: I think, if your Honor please, the question has been answered.

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lydick): Does that mean no? Does that mean that you did not ask him?

Mr. Lincoff: Your Honor please, I submit that there is an answer which is responsive to the question. [252]

The Court: There isn't any motion to strike out the answer, is there? He is just arguing further with the witness about it.

Mr. Lydick: I asked to have the question read again and prior to that time the other colloquy began. I do not believe the answer was responsive to the question.

The Court: Ask it again.

Mr. Lydick: Read the question.

(The question was read.)

Mr. Lydick: I do not believe the answer that the witness gave was responsive to that.

The Court: Read the question and answer.

(The record was read.)

The Court: Mr. Witness, we don't care what you thought was necessary or unnecessary. We don't want your argument in the case. Your lawyer can argue your case.

The Witness: I am sorry, sir.

The Court: When a question is asked, answer the question. Bear in mind it is a particular inquiry of a particular fact and answer the question and don't make a comment.

The Witness: I asked Mr. Piersol for the 45½-inch width.

(Testimony of Leonard J. Mills.)

Mr. Lydick: I submit again the answer is not responsive.

The Court: The answer may be stricken.

The Witness: I don't recall that I used that exact [253] phraseology. I will tell you what I think I told him. May I tell you then what I think?

Q. (By Mr. Lydick): You may say anything you wish.

A. I believe that I said to Mr. Piersol that I would prefer having a 45½-inch width of this material. I didn't say whether it would be particularly important. That is where I was wondering just what your phraseology was.

Q. It wasn't particularly important to you that it be 45½ inches? If it were a little less than that, it didn't make any difference?

A. Oh, yes, it did.

Q. Oh, it did. I see.

A. I didn't mean I may have told that to Mr. Piersol, if we are going to get into that. That is what I am getting at. I said to Mr. Piersol, "I prefer the 45½-inch width."

Q. Is it that you don't remember whether or not you told Mr. Piersol that the 45½-inch width was particularly important?

A. Mr. Lydick, in that business when you order a width of a certain width there it means that is the minimum of the width. When I ask for 45½-inch width, that is the minimum width. They may give it to you a little larger, a little wider.

When I say, "I prefer having the 45½-inch

(Testimony of Leonard J. Mills.)

width," Mr. Piersol understood it was 45½-inch minimum. [254]

Q. There was no need for you to remind him it should be any less than that?

A. That is right.

Q. Will you look at the March 6th letter and the March 14th memorandum of order and give to me the quantity of goods on the March 6th letter?

Mr. Lincoff: May I ask you identify the exhibit by number? There are two March 6th letters.

Mr. Lydick: Exhibit No. 7. Do they differ on quantity, counsel?

The Witness: I am sorry. Would you repeat your question?

Q. (By Mr. Lydick): Will you read the quantity of the goods on the March 6th letter?

A. Yes. 101,200 yards of 45½-inch goods and 23,900 yards of the 47½-inch goods.

Q. Will you read me the quantity on the March 14th memorandum of order?

A. 126,000 yards of the 45½-inch goods.

Q. Will you read me the terms?

A. On the——

Q. On the March 6th letter.

A. I can read you the March 6th letter.

"This will confirm our quotation to you of today on 101,200 yards of 45½ rayon cartridge cloth in the greige as per Specification PXS-1300 at 36⅛ cents [255] per yard and 23,900 yards of the same material in 47½-inch width in the greige at 37⅜ cents per yard, both on terms of net 30 days,——"

(Testimony of Leonard J. Mills.)

Q. That is enough. I just wanted the terms. The terms are net 30 days, is that right?

A. That is right.

Q. Will you read the terms off the memorandum of order, without reading the entire order, unless you feel it is necessary to explain it.

A. "Net 30 days, 10 per cent with contract."

Q. Will you read me the shipping instructions——

The Court: Counsel, the court wonders where we are getting in having the witness read exhibits and parts of exhibits. Those things are before the court, they being incorporated in any brief, they can be elaborated upon in argument and read. The court can read. I don't need this witness to read for me.

Mr. Lydick: Very well, your Honor.

Q. (By Mr. Lydick): You have a copy of the memorandum of order in front of you?

A. Yes, sir.

Q. Did you ever receive a copy of that yourself?

A. That is what I received.

Q. You presently then have it in your possession, it is your copy?

A. I believe this is the copy I received (indicating). [256]

Q. Do you recollect when you received it? You testified previously you received it March 14th.

A. That is correct.

Q. You note it is dated March 14th?

A. That is correct.

(Testimony of Leonard J. Mills.)

Q. Was it delivered to you personally or mailed to you? A. I received it in the mail.

Q. March 14th is a Friday, Mr. Mills. You still believe you received it March 14th?

Mr. Lincoff: Your Honor please, I don't wish to protract this, but I think the testimony was in response to my question, "Did you receive it on or about the date it bears," and I think the answer was——

Mr. Lydick: Wasn't it at all. We have that testimony exactly——

The Court: He is entitled to probe into that. He is beginning to ask things that would rest neither in this witness' memory or in documents not yet before us. This is cross examination. What I was objecting to was the reading of the documents. He is doing something else now, which is proper.

The Witness: I am sorry. Are you waiting for my answer?

Q. (By Mr. Lydick): Did you receive this document the same day it is dated?

A. I don't recall. I received this in the mail about the 14th of March. I assume I got it possibly the next day. [257]

Q. Could it have been the following Monday, March 17th?

A. It more likely would. If the mail were prompt it would be on Saturday.

Q. Did you read it when you received it?

A. Yes, I did.

Q. What did you do with respect to it? Did it

(Testimony of Leonard J. Mills.)

correctly state the information you had given to Mr. Piersol?

A. As to the width and quantity.

Q. Is there any portion of it that is incorrect?

A. I believe so. The only error that was in there, that I noticed, was that I believe there was a typographical error in the price which stated $38\frac{1}{8}$ cents instead of $36\frac{1}{8}$ cents.

Q. Did you bring that to Mr. Piersol's attention?

A. I may have. I don't think it was of any importance there. I don't know whether I did or not.

Q. Two cents on a hundred thousand yards—

A. I wasn't being charged that. I believe it was a typographical error.

Q. You don't recall whether you called that to Mr. Piersol's attention?

A. That is right. I don't recall. We had that price set up before this (indicating); this was just a confirmation of it.

Mr. Lydick: I move that portion of the answer be [258] stricken out.

The Court: Strike it out.

Q. (By Mr. Lydick): Was there any printing on the bottom of that memorandum of order?

Mr. Lydick: I object to it on the ground the document speaks for itself, if your Honor please.

The Court: Sustained.

Q. (By Mr. Lydick): Did you read the entire document?

A. I may have, I don't recall.

(Testimony of Leonard J. Mills.)

Q. What portions did you read and what portions didn't you read, if you can recall?

A. I read all the typed part.

Q. You read all the typed part?

A. That is right, sir.

Q. Did you read the printed part?

A. I may have, I don't recall.

Q. Did you make any objection to Mr. Piersol with respect to anything occurring on that document, printed or in writing?

A. I did not.

Q. Price, quantity, widths, terms, delivery, shipping, seconds, printed language at the bottom, you made no objection to any of that?

A. I did not.

Q. During the period March 14th to March 21st, which [259] I believe is the day you testified Mr. Piersol called you to inform you of the difficulty regarding the subject matter, what, if any, discussions did you have with Mr. Piersol?

A. One thing I recall was that he called me at approximately prior to the 20th of March or on the 20th of March, and said he received the request from New York to secure from me a check for the 10 per cent of the goods which the credit manager and I had agreed to my paying in advance.

I immediately made out such a check and brought it over and presented it to Mr. Piersol.

Q. Was there anything else, any other discussions with him of any kind?

A. I can't recall.

Q. Was this deposit ever returned to you?

(Testimony of Leonard J. Mills.)

A. At a much later date, yes.

Q. But you did receive it back?

A. Long after this whole, after correspondence between my attorney and Deering-Milliken attorney at New York.

Q. When was the date you received it back?

A. I don't recall the date I got it back.

Mr. Lydick: Does your correspondence show, Mr. Lincoff?

Mr. Lincoff: I think it does.

Mr. Lydick: I take it we didn't find that other letter, is that correct?

Mr. Lincoff: I haven't been able to find it yet, Mr. [260] Lydick.

Q. (By Mr. Lydick): Did you receive back the same check you had delivered?

A. Yes, I did.

Q. It had not been deposited?

A. No, it had not.

Mr. Lydick: May we go forward and you tell us when you find the correspondence that will help this witness to determine when he got it back?

Mr. Lincoff: Yes, I will be happy to. I have that here. I saw it just a few moments ago.

Q. (By Mr. Lydick): Did he tell you why he wanted, did Mr. Piersol tell you why he wanted the check then instead of as indicated on the memorandum of order, which says "10 per cent deposit with contract"?

(Testimony of Leonard J. Mills.)

A. He said he received a request from New York for the check.

Q. He gave you no reason as to why they wanted it, other than it was stated on the memorandum?

A. I don't know whether they gave him any reason for it, other than the fact I felt they were entitled to it and gave it to them immediately.

Q. It didn't make any difference whether you gave it then or in accordance with the memorandum?

A. No, I can't see what—I can't see what your point is. [261]

The Court: You don't have to see what his point is. You just answer questions as to facts.

The Witness: I am sorry, your Honor.

Q. (By Mr. Lydick): Did you have any discussions regarding samples during this week's period, that is, the 14th to the 21st?

A. Discussion on that, on that 50-yard piece. That took place through that entire period. I don't recall exactly where it started and where it ended.

Mr. Piersol called me, after he first advised me it was going to the Pasadena Ordnance Office a day or two later, or more, he got a call, or, he called me and said he had a TWX from New York advising him that the 50-yard piece they sent to Colonel Heath did not meet—it was not the piece they meant to send, and they did not have the goods to meet the specifications.

(Testimony of Leonard J. Mills.)

Q. Is that what he told you?

A. That is correct. I believe he got a TWX or a phone call; I don't recall which of the two he got from New York, but it was not the goods they intended to send.

Q. Did he tell you in what manner it was not the goods they intended to send?

A. I don't recall.

Q. Isn't it a fact he told you that the piece they had [262] sent was finished and not greige goods?

A. If he had said that, I don't know if that was it, I don't remember. But all I do remember was that the problem immediately came up when I was to get the goods to meet—to get for the pilot run.

Q. You recall what you said to him?

A. That I would immediately get in touch with Colonel Heath and see what could be worked out for the pilot run.

Q. Was there any other conversation whatsoever with respect to this special piece of goods?

A. I can't recall at the moment.

Q. Do you have any recollection of Mr. Piersol telling you that these goods were finished and not greige goods and, therefore, were not the goods that you were going to get?

A. He told me they were not the goods that were meant to be given to me, that I had ordered. I don't recall his saying, explaining why they weren't the goods.

(Testimony of Leonard J. Mills.)

Q. He told you this piece that had been sent was not the goods you had ordered?

A. That is right. That was not the goods that was to be in the order.

Q. Do you recall his telling you they were finished, whereas the goods you ordered were greige?

A. I don't recall whether that was said or not.

Mr. Lincoff: If I may interpose, Mr. Lydick, it appears [263] that under date of April 15, 1952, a letter was sent from Deering-Milliken & Co., addressed to Modern-Aire, in which they state they are returning "your check in the sum of \$4,551.75," and that appears over the signature of J. Calhoun Harris, Vice President, Deering-Milliken Co. Inc.

Q. (By Mr. Lydick): Does that refresh your recollection as to this long after period about three weeks after this difficult first on March 21st, is that correct?

A. I imagine that is the date.

Q. During this period of March 14th to March 21st, did you have any discussions with Mr. Piersol or anyone else at Deering-Milliken with respect to delivery schedules?

A. Other than what I have already testified, I don't recall anything further.

Q. Well, what delivery schedule does the memorandum of March 14th call for?

Mr. Lincoff: That is objected to, if your Honor please, on the ground the document will speak for

(Testimony of Leonard J. Mills.)

itself, if at all, with respect to that or any other item.

Mr. Lydick: It is necessary for a proper presentation for the next question, to ask the next question.

The Court: When you wish to call attention to a particular exhibit, mention it and the clerk will hand the exhibit up.

Mr. Lydick: It is in the hands of the witness, your [264] Honor.

The Court: The court will read it if you ask a question concerning the factual situation reflected in it or that supports it.

Q. (By Mr. Lydick): What delivery does the memorandum of order call for?

A. Every two weeks, starting the 18th of April and earlier, if possible; not later than the 18th of April.

Q. During the period March 14th to March 21st did anyone tell you unless that delivery was changed Deering-Milliken would have to pass up the order?

A. No, sir, no one mentioned that to me.

Q. Did anyone say anything to that effect?

A. I cannot recall any such information.

Q. Was the delivery schedule in fact changed thereafter?

A. I don't recall whether it was or not.

Q. The delivery schedule was very important to you?

A. That is right. At this date, two years later,

(Testimony of Leonard J. Mills.)

I don't recall whether there was a change from that or not. If there was, I would have evidence of that fact.

Q. Where would you have evidence?

A. In my file.

Q. Do you have anything in your file that is evidence of the fact that the delivery schedule was changed between March 14th and 21st? [265]

A. Nothing that I can show for that, I don't believe.

Q. Well, I hate to waste the court's time. Why do you think you would have evidence of that particular fact?

A. It would be a very material point. I can't recall from looking at that there was a change from that. If you can show me there was such a change, I can tell whether it took place or not. I can't recall two years later whether this date was changed.

Q. You don't know of any delivery schedules made during the period March 14th to March 21st?

A. I can't recall it.

The Court: May I ask plaintiff's attorney, was there anything in this situation which bound this plaintiff to take the merchandise? Suppose they had shipped it out to him and the Army had canceled or his place had burned up, or some other consideration, would he have been bound to accept the merchandise.

Mr. Lincoff: I think without question, Judge Tolin.

(Testimony of Leonard J. Mills.)

The Court: Under what particular circumstances?

Mr. Lincoff: Well, sir, I feel there had been a commitment to furnish him with this merchandise whether or not——

The Court: The commitment was a double-edged sword, an obligation on one part to supply and on the other to receive?

Mr. Lincoff: That is correct, sir, and I think the correspondence later will show that Deering-Milliken & Co. [266] constantly advised us **they were** going to hold us liable for damages they suffered. If we brought any litigation there would be counterclaims. That is their opinion.

I think, as a matter of law, there certainly could have been a cause of action for breach of contract.

Whether or not it would have resulted in recovery of damages or whether it would be specific performance is something else again. Certainly there would have been an actionable breach of the contract.

The Court: I was just wondering. Questions come to my mind as I hear this, and if you don't mind I will sometimes ask them without thereby intending any answer——

Mr. Lincoff: I appreciate it. In addition to which, your Honor, the check had been received and held for a considerable period of time.

Mr. Lydick: Much of this testimony, after other witnesses are brought to the stand, will have a bearing on precisely the question your Honor has raised.

(Testimony of Leonard J. Mills.)

I can't at times raise it as easily as you can. I have to bring it out by these other methods.

It will come up in the future, as to whether or not there was such a situation.

Q. (By Mr. Lydick): Now, March 21st, I believe, you testified that Mr. Piersol informed you that our greige goods would meet Specification PA-PD-29, is that correct? [267]

A. That is correct. I would like to explain exactly what Mr. Piersol said and what took place.

Q. All right.

A. On March 21st, I believe the date was, Mr. Piersol called me on the phone——

Q. Excuse me. Did you have more than one conversation with him that day?

A. I don't recall. I recall this incident very distinctly.

Q. Do you recall whether you had more than one conversation with him?

A. I possibly did, after I spoke to—yes, I did. I spoke to him on the phone——

Q. Will you keep them in chronological order, as to what he said in his first one and what you said, and what he said in the second one and what you said?

A. I will do my best. I had gotten a call from Mr. Piersol advising me he had gotten a TWX from New York, and he read it to me on the phone, the substance of which was that the mill could not meet the specifications, the porosity in time to meet delivery.

(Testimony of Leonard J. Mills.)

Q. Beg your pardon. That was your impression of what the substance of it was?

A. The TWX was here.

Mr. Lydick: I would offer it. I am sure it would be [268] objected to.

Mr. Lincoff: It is in evidence. I will be happy to let you show it to him.

The Witness: I will be glad to read it.

The Court: If you want me to read it, just say so, and the clerk will hand it up.

Q. (By Mr. Lydick): Go ahead and tell us what happened.

A. He read the TWX to me on the phone. I told him I would be over there immediately.

I went immediately over to his office. He showed me——

Q. That is all you said to him in that conversation?

A. That is correct; on the phone.

Q. You said, "I will be right over"?

A. I believe that is it.

Q. Then you went over?

A. Then I went over.

Q. This is the second conversation?

A. Yes. He showed me the TWX and in our conversations there he said to me, "That looks like they won't be able to meet the first delivery of April 18th or 20th on that. Can you do something with the Ordnance Department?"

I said, "I will go over to the Ordnance," and

(Testimony of Leonard J. Mills.)

asked him for the TWX to take with me. He gave it to me. I went over to the——

Q. Was that all there was to that conversation? [269]

A. Possibly at that time or when I spoke to him later in the day, he spoke of my—we discussed our getting it from another source.

Q. What else happened at that conversation, if anything, that you remember?

A. Well, Mr. Piersol told me to take—I said, “I will take it over to the Ordnance Department and see whether they can get either a delay in the delivery date of that first shipment to the Government,” or if I could get the goods from another source for that first portion.

Q. It was at this second conversation?

A. That is right. That was for approximately 20,000 yards. I went over——

Q. Did you have any other conversations at that second time?

A. In his office there? I think that covered it, substantially. I am not sure.

Q. Did you discuss at all what the teletype meant? A. Yes.

Q. Did you tell him what you thought it meant? Did he tell you what he thought it meant?

A. I didn't tell him what I thought it meant; he told me what he thought it meant.

Q. What did he tell you he thought it meant?

A. They would not be able to meet that first

(Testimony of Leonard J. Mills.)

delivery [270] of 20,000 yards by the delivery date it was scheduled.

Q. May I show you the teletype. It is Exhibit 11.

On either the first or second conversation you had with Mr. Piersol on this 21st of March, did you have any further discussion of this teletype, other than you have testified? A. No, sir.

Q. Did you have any discussion of the meaning of the first sentence there? Did he tell you what that first sentence meant? You read it, if you wish.

A. "Regarding Modern-Aire Spec Calls For Minimum Porosity of 35 Cubic Feet Per Minute Per Square Foot and a Test Just Completed on Our Greige Cloth Showed 8.5 Porosity Which Does Not Meet Government Spec."

Q. Did you have any discussion whatsoever regarding that particular sentence?

A. Nothing, other than what I testified.

Q. What does the second sentence say?

A. "In Order To Correct This Would Require Too Long a Time and We Be Unable To Meet Delivery Do Everything Possible To Have Customer Accept."

Q. As I understand your testimony, you did have some discussion regarding that phase of it, because you and Mr. Piersol both thought that referred only to the first portion of the contract.

A. That is correct. [271]

Q. Was there any other conversation with regard to that second sentence?

(Testimony of Leonard J. Mills.)

A. No, not at that time.

Q. How about the third sentence?

A. There is no third sentence. That is the end.

Q. "Do Everything——"

A. "Do Everything Possible To Have Customer Accept."

Q. He didn't say anything about it?

A. Other than to go over to the Ordnance and get——

Q. After you went over to the Ordnance——

Mr. Lincoff: Had you finished your answer, Mr. Mills?

Mr. Lydick: Excuse me. I thought you had.

The Witness: Other than to go over to the Ordnance and see if I could get a delay in the first commitment delivery to the Government or see if I can purchase the approximately 20,000 yards from another source to complete that portion of it.

Q. (By Mr. Lydick): Does that complete your answer to that question? A. That is right.

Q. After you had gone over to the Ordnance, did you have any further conversations with Mr. Piersol?

A. When I did—I passed on to him the information I got from the Ordnance Department.

Q. What did you say and what did he say? Where, first, [272] was the conversation?

A. I believe I spoke to him on the phone or in person—I am not sure which—when I got through with Ordnance. I may have called him. I

(Testimony of Leonard J. Mills.)

may have been over there in person, I can't quite recall.

But I told him that the Government could not delay the initial delivery schedule, that they got in touch with their representative in Joliet and from them learned the source of other mills where other contractors for this item were securing their goods. They gave me the name——

Q. You told all this to Mr. Piersol?

A. That is right.

Q. Very well.

A. They gave me the name of Paul Whitin mill, for one, a Mr. Lundy as their representative.

Q. Did you tell Mr. Piersol that?

A. Yes, I did.

Q. Very well.

A. I got in touch with Mr. Lundy that very same afternoon. I believe he was in Chicago at the time, just about ready to call on the Joliet office, and I learned from him I could secure that 20,000 yards, approximately in not the same width, but in a similar width, or, rather, another width. But that the goods would cost me \$1,600.00 more for just that 20,000 yards. [273]

Q. Did you tell Mr. Piersol all of that?

A. I did, because Mr. Piersol then told me that was fine. That was the expression he used. He would pass that information on to New York and see what they said.

Q. Did Mr. Piersol say anything else, other than

(Testimony of Leonard J. Mills.)

that, during this entire conversation that you can remember? A. I don't recall.

Q. That is all he said in this third conversation?

A. That is right.

Q. Did you have any other conversation with Mr. Piersol that day?

A. I don't believe so.

Q. Did Mr. Piersol at any other time give you any other explanation than the ones you have already testified to, with respect to this teletype?

A. That day?

Q. Any time.

A. Well, yes, the next day or day after the next he called me to advise me that he got an answer to that message that he phoned to New York, saying it would cost \$1,600.00.

Q. March 22nd or 23rd?

A. That is right. In which they advised him——

Q. Saturday or Sunday?

A. Well, as I say, it may have been Monday. But it was the business day following the day that I spoke to him. [273-A] In which they advised him that they could not meet the specifications for the contract, as a whole; not just for the first delivery.

Q. It wasn't the same day, though, that wasn't March 21st?

A. It wasn't the same day. He TWX'd the \$1,600.00 question to them and the following business day, I will put it that way, he got the answer and called me with that answer.

Q. It couldn't have been the same day?

(Testimony of Leonard J. Mills.)

A. No, sir, it wasn't, because late in the afternoon, by the time I got—called him from Pasadena or got through with the Ordinance in Pasadena——

Could I have a two-minute recess?

The Court: The witness wants a recess. The witness said, "May we have a two-minute recess?"

It is difficult to keep recesses to two minutes. We will do the best we can.

(Short recess taken.)

Mr. Lydick: May I have Exhibits 9 and 10?

The Clerk: Yes, sir.

Q. (By Mr. Lydick): Please, would you just take a quick look at that letter, because I think it will be necessary to follow the examination.

A. (Witness complies.)

Q. Now, Mr. Mills, on March 20th you say you received this letter. [274]

A. I am sorry.

Q. Plaintiff's Exhibit No. 10.

A. That is right, on March 20th I received this letter (indicating).

Q. Did you receive it in hand?

A. In hand.

Q. At Mr. Piersol's office?

A. That is correct.

Q. At the time you delivered the check?

A. That is correct.

Q. Did you have any conversations with Mr. Piersol at that time?

A. I cannot recall any.

Q. Do you recall anything you said to him at all with respect to that letter?

(Testimony of Leonard J. Mills.)

A. I do not recall anything.

Q. Did you ask for the letter?

A. This was a receipt for the check I gave him.

Q. Is that the purpose of the letter, so far as you are concerned, just a receipt?

A. Yes, I believe that it is. That is the way it reads.

Q. Did you say anything at all to Mr. Piersol regarding the letter?

A. I do not recall anything.

Q. Did he say anything to you at all regarding the [275] letter? A. I do not recall.

Q. You had your conversations with the Whitin Company representative while you were at the Pasadena Ordnance Office. Did they quote you on greige goods or finished goods?

A. They quoted me on goods to meet Specification PA-PD-29.

Q. Did you have any discussion with them with respect to whether or not those were greige goods or finished goods?

A. The only discussion I recall was it was cartridge cloth as to Specification PA-PD-29.

Q. Will you tell me what you said and what the Whitin representative said?

A. It is difficult to recall the exact words. I received a quotation on those goods as per those specifications.

Q. Did you have any conversation with respect to those, whether or not what he was quoting you

(Testimony of Leonard J. Mills.)

was with respect to greige goods or finished goods?

A. I don't recall.

Q. You have no recollection?

A. No, other than the fact it was the goods I needed to meet those specifications.

Q. It was after you learned from Mr. Piersol that Mr. Piersol's greige goods would not meet the specifications? A. That is correct. [276]

Q. You don't know whether you got a quotation on greige goods or finished goods when you talked to the Whitin representative?

A. No. All I called for at that time—I didn't know why it didn't meet specifications PA-PD-29.

Q. You read the teletype?

A. Yes, but that didn't say whether it was greige goods or not.

Q. Really? "Re Modern-Aire Spec Calls Per Min Porosity of 35 Cubic Feet Per Minute Per Square Foot and a Test Just Completed On Our Greige Cloth Showed 8.5 Porosity Which Does Not Meet Government Spec."

So it did say "greige," didn't it?

A. Yes, but I do not know that "greige goods" cannot meet that porosity.

Q. You have no recollection of making any inquiry to the Whitin representative, as to whether or not he was quoting in the greige or finished.

A. No, just so long as they met the specifications.

Q. Did he make you a quotation?

A. He did.

(Testimony of Leonard J. Mills.)

Q. On greige goods or unfinished goods?

A. On goods as per specification.

Q. He made no mention to you as to whether, or not they were in the greige? [277]

A. No, sir. He was recommended to me as supplying that fabric to other mills, to other processors.

Mr. Lydick: I submit the answer already is not responsive.

The Court: Stricken. If you wish to have the question read again, you may.

(The question was read.)

The Witness: He did not.

Q. (By Mr. Lydick): He did not?

A. No.

Q. Do you have any recollection whatsoever of having called Mr. Piersol, after you talked to Mr. Whitin's representative, and telling Mr. Piersol that the Whitin representative told you their greige goods would meet the specifications?

A. I don't recall whether I said that.

Q. Do you recall saying anything to that general effect?

A. I only recall that I told Mr. Piersol that the Whitin representative can supply me with the goods. It will cost me sixteen hundred—

Mr. Lydick: I submit the answer is not responsive. I submit that is one reason this examination has been so long.

The Witness: Will you repeat the question?

(The record was read.)

(Testimony of Leonard J. Mills.)

The Witness: I did not recall.

The Court: The answer is stricken. Mr. Witness, I wish you would bear in mind what the court has suggested to you, [278] as to what is proper and improper in connection with answering questions.

You are supposed to answer questions. If you have other information which might be of interest in connection with it, at the next recess bring it to the attention of your attorney and he will have a chance to ask you on redirect.

Q. (By Mr. Lydick): Did you ever ask the Whitin representative for a quotation on the total amount of goods you needed?

A. At a later date.

Q. Did you receive a quotation?

A. I did, sir.

Q. In writing?

A. I believe I may have. I believe it may be in the files there. I have several telegrams from them.

Mr. Lydick: Shall we wait for it, counsel, or will you bring it to our attention?

Mr. Lydick: I will bring it to your attention.

Q. (By Mr. Lydick): Do you recall what their quotation was? A. I do not offhand.

Q. Do you recall how much later you asked for this quotation?

A. After Mr. Piersol advised me the mill had no intention of supplying the goods on our contract at all. [279]

Mr. Lydick: I ask that answer be stricken on

(Testimony of Leonard J. Mills.)

the ground it contains a conclusion, "on our contract."

The Court: He is attempting to give you a time, counsel, by relating it to an event. Insofar as it attempts to classify the contract as an administration to perform under a contract, it will be disregarded, but it will be deemed to relate to a conversation on that subject which was properly referred to.

Mr. Lydick: Thank you. I withdraw that question. Proceed.

The Witness: I am sorry.

The Court: Everything after "supplying the goods" will be stricken.

The Witness: After supplying the goods I made inquiry of the Paul Whitin Company on the quotations on the entire amount.

Q. (By Mr. Lydick): Does that mean by "after," a week after or what after Mr. Piersol told you that?

A. After Mr. Piersol told me that, I then went to the Ordnance Department. They, in turn, suggested I contact these three other mills for quotations.

Q. With respect to the total quantity?

A. For the total quantity.

Q. What were the three other mills?

A. Paul Whitin, for one. I don't recall the names of the other two. [280]

Q. Were they local?

A. No, they weren't.

Q. What part of the country were they in?

(Testimony of Leonard J. Mills.)

A. Well, Paul Whitin, I know, was in Massachusetts.

Q. I am after the other two.

A. I don't recall. Some place back East, whether it was the south or northeastern part I don't recall.

Q. You have written quotations from them on the total amount?

A. I don't believe I have written quotations from them. The quotation I got from Paul Whitin was the lowest of the three.

Q. How do you think you received the other quotations? A. I don't recall.

Q. Telephone?

A. I believe I wired them and I may have gotten a wire back; I just don't recall.

Q. Do you have the wire?

A. I don't recall that.

Mr. Lincoff: If I may interject, I think I can save a little time. I have letters from J. P. Stevens, Inc., from Iselin-Jefferson Co., Inc., in which there are quotations of prices and other matters inquired about.

The Witness: Was that of the date after the 21st of March? [281]

Mr. Lincoff: Yes.

The Witness: Those are the other two.

Mr. Lydick: Would you care to give these to your client, so he can refresh his recollection?

Mr. Lincoff: Yes. Go ahead. Use them any way you wish, Mr. Lydick. That is perfectly all right.

Q. (By Mr. Lydick): With respect to those,

(Testimony of Leonard J. Mills.)

did those in any way, from your files, refresh your recollection as to names of companies you contacted after Mr. Piersol said they did not intend to deliver, if he told you that?

A. I am sorry. Would you repeat that, please? I was reading.

Mr. Lydick: Strike the question. I will ask it again.

Q. (By Mr. Lydick): Do these letters refresh your recollection in any manner as to those persons you contacted for quotations on the total amount of goods you needed, after Mr. Piersol told you that he was not going to deliver these goods as you desired them?

A. Yes, sir, it does.

Q. Whom did you contact?

A. J. P. Stevens & Co. and Iselin-Jefferson Co.

Q. When did you contact J. P. Stevens & Co.?

A. I don't recall. Shortly after the 22nd or 23rd of March, or thereabouts, that I contacted all three.

I received these quotations from J. P. Stevens. One [282] dated April 4th, and one from Iselin-Jefferson dated March 31st.

The Paul Whitin quotation was lowest of the three.

Q. Was lower than the J. P. Stevens quotation?

A. That is correct.

Q. Lower than the Iselin-Jefferson quotation?

A. That is correct.

Q. Do you recall how much lower?

A. I do not. I can better tell you how much

(Testimony of Leonard J. Mills.)

more the Paul Whitin Company price was over the Deering-Milliken price.

Q. Can you? A. Yes.

Q. What was the Paul Whitin price?

A. It came to approximately \$10,000.00 more for the entire——

Q. Can you tell me in cents per yard?

A. No, I can't. I don't recall the exact cents, but in computing it, it came to approximately \$10,000.00 difference.

Q. You still testify, however, that the Paul Whitin price was lower than these two?

A. That is correct.

Q. Yet it came to \$10,000.00 more?

A. That is correct.

Mr. Lincoff: May I inquire of counsel, does he wish to [283] offer these in evidence, the two letters?

Mr. Lydick: No.

The Court: They have been referred to sufficiently here they should be given an identification number.

Mr. Lydick: I merely used them so the man could refresh his recollection from his files, your Honor. I have no desire to offer them in evidence.

Mr. Lincoff: We will be happy to offer them at the appropriate time.

The Court: Mark them for identification. There has been enough use of them here, while it doesn't seem too appropriate to take them into evidence at this moment, they should be marked for identifica-

(Testimony of Leonard J. Mills.)

tion so if further reference to them is made it can be tied back to the immediately given testimony.

Mr. Lydick: I would not offer them in evidence. I would object to their introduction in evidence. If they are marked for identification, that is satisfactory.

The Court: They are simply being ordered marked for identification at this point.

Mr. Lincoff: They may be marked as plaintiff's next in order for identification. I have no objection.

The Court: I don't think as it stands at present they will be admissible.

Mr. Lincoff: No, they would not.

The Court: If they become admissible they should be [284] considered in the light of the testimony just given.

The Clerk: The letter of April 4th, Plaintiff's Exhibit 15. And the letter of March 31st, Plaintiff's Exhibit 16 for identification.

(The documents referred to were marked Plaintiff's Exhibit Nos. 15 and 16 for identification.)

Q. (By Mr. Lydick): When was the next conversation you had with either Mr. Piersol or anyone else during that time?

A. There were any number of conversations. I can't recall just when the next one took place.

Q. With whom did you have further conversations?

A. Well, I spoke to Mr. Piersol several times. He advised me there was nothing he could do about

(Testimony of Leonard J. Mills.)

it, that he got his information from New York and he could only follow out what they instructed him to do.

I went over to the Ordnance Department on a number of occasions, to see what they could do for me.

Q. I want your conversations with people of Deering-Milliken, Mr. Mills.

A. That is all I can recall.

Q. Did you have any conversations with Mr. Harris during that time?

A. Mr. Drake of the Ordnance,—

Q. Did you have any conversations with Mr. Harris?

A. I believe that I did. I am not sure whether I had [285] them—I know Mr. Drake did. I don't know whether I, in turn, spoke to him.

Q. What did you say and what did he say?

A. I can't recall.

Q. When were these conversations?

A. After this came to pass.

Q. You can't recall anything of what you said and what he said?

A. Other than the fact that they didn't intend to fulfill their contract. I can't recall just what it was.

Q. You say Mr. Drake had some conversations with him?

A. Yes, Mr. Drake did call Mr. Harris, to see if he could, acting for the Government to see if he

(Testimony of Leonard J. Mills.)

could get Deering-Milliken to live up to the contract.

Q. Is there anything else you recall of Mr. Drake's conversation? A. Yes.

Q. These were about the same time chronologically, the ones you had with Harris and the ones Drake had with Harris?

A. I believe Drake spoke to Harris after I did, if I spoke to Harris. I am a little bit confused whether I spoke with Harris personally or not. I am not sure of that.

Q. Did you talk to him on the phone?

A. It was on the phone if I spoke to him.

Q. But you can't recollect any more than you have [286] already told us about such a conversation, if there was one?

A. I can recollect the conversation Mr. Drake had.

Q. You can't recollect anything about the one you had?

A. No. It didn't do—didn't serve my purpose.

Q. Did Mr. Piersol tell you that Deering-Milliken expected you to finish the goods at all times?

A. He never told me that.

Q. He never told you that? A. No, sir.

Q. I understand the contract you had with the Government was a negotiated contract, is that correct? A. That is correct.

Q. What items did the negotiation cover?

Mr. Lincoff: Objected to, if your Honor please, on the ground the contract is in evidence and is the

(Testimony of Leonard J. Mills.)

best evidence, and will speak for itself with respect to all matters therein contained.

Mr. Lydick: If there is anything in the contract at all, with respect to negotiations, I would be most happy to refer to them. All they refer to is conclusions.

Mr. Lincoff: I respectfully submit the parol evidence rule would apply.

The Court: Let's see the exhibit.

Mr. Lydick: Exhibit 12.

The Court: The court isn't going to take any witness' [287] interpretation on a document such as this, except to explain any ambiguity or to explain any words or phrases which have a particular meaning in a particular area of activity contracted upon.

Mr. Lydick: Your Honor please, I have no intention whatsoever of examining this witness with respect to any matter that is contained in that contract. That contract was a negotiated contract, he just testified.

I presume the negotiations must have covered the period December 18th to March 14th, the date it was signed. By his own testimony it started December 18th. I wish to inquire with respect to portions of those negotiations.

The Court: Negotiations emerged into the contract——

Mr. Lydick: Not from my point of view. It may be between Mr. Mills and the Government, your Honor, but not from my point of view in determin-

(Testimony of Leonard J. Mills.)

ing what was said at these negotiations and what was done as those may relate to matters said and done with respect to us.

The Court: I will conditionally admit such testimony then, and trust to you in your brief to point out the propriety of giving it consideration and where it relates to the particular controversy we have.

Mr. Lydick: It will be tied up before my examination is completed, your Honor.

The Court: You don't have to do it before the examination. [288] But you are going to brief this case, I understand. When you brief the case point out wherein the testimony you are now going to adduce bears some relevancy or materiality and is within the rules of evidence.

Now, it is a quarter of 5:00. We have held over a little longer than my usual adjournment time.

It appears that there is some possibility the case set for trial here at 10:00 tomorrow, which I would call for the impanelment of the jury for, might not be tried. There is no assurance to that, unfortunately. But if you want to come in at 10:00 we may be able to take you at 10:00 or within a very few minutes afterward.

If you want to wait until 11:00, we will expect to get a jury impaneled by 11:00 in this case.

What do you want to do?

Mr. Lincoff: We would suggest 11:00 o'clock.

The Court: 11:00?

Mr. Lydick: Yes.

The Court: All right. This particular case is recessed then until 11:00 a.m. tomorrow.

(Whereupon, at 4:45 o'clock p.m., Monday, November 23, 1953, an adjournment was taken until Tuesday, November 24, 1953, at 11:00 o'clock a.m.) [289]

Los Angeles, Tuesday, Nov. 24, 1953, 11:00 a.m.

The Court: Proceed.

Mr. Lydick: Thank you, your Honor.

Will you take the stand, Mr. Mills, please?

Your Honor please, Colonel Bready of the United States Army is here in response to a subpoena directed to him yesterday afternoon, asking him to bring in all the records and files of the Department of the Army with respect to negotiations with Modern-Aire.

The Colonel points out and will point out to the court that the subpoena is in such form, in that it is so general that if he were to ask permission of the Judge Advocate General's Department, on the basis of that subpoena, it would be a long, long time, if ever, before we got what we wanted, which is the final record of the submission by Modern-Aire of California.

He points out, however, if we will issue a new subpoena asking specifically for what we want, which we now know to be in a specific set of files, the files are in different locations, and he believes he could possibly get permission to bring that in to the court.

Therefore, what I would like to do is prepare a subpoena in the proper form and the Colonel is

willing to accept service of it here this morning, and will then, I believe, cooperate with us to the extent of teletyping to the Judge Advocate's [293] Department to receive permission to bring into court that particular portion of the Government's file.

Is that satisfactory with the court and counsel?

The Court: It is satisfactory. I don't think we ought to use court time on those things that must be done in the court, such as the taking of evidence. Is it agreeable for the Colonel to remain here until noon——

Mr. Lydick: I have other counsel with me who will prepare the subpoena. I would like to do that so the Colonel could be excused, if that is satisfactory to your Honor.

The Court: Yes, that is certainly satisfactory.

Mr. Lydick: Is that satisfactory to counsel?

Mr. Lincoff: Plaintiff has no objection.

Mr. Lydick: Colonel Bready, I have discussed with the court the problem regarding the subpoena. I have the court's permission to prepare a new subpoena and effect service on it, and we understand the Department of the Army will at least cooperate to the extent of transmitting it to the Judge Advocate Department in as rapid a fashion as possible, to get permission to bring in the files we need.

Col. Bready: May it please the court, we are more than anxious to cooperate. As soon as I have the subpoena I will communicate with the Judge Advocate General's Office.

Mr. Lydick: May I have a two-minute recess to instruct my co-counsel? [294]

The Court: Yes. Thank you, Colonel, for coming in and for your willingness to cooperate.

I have found in my experience that usually if you will avoid getting into material of a high order classification, that that which has one of the lower order classifications will be provided if the parties will just let the Military know what they want.

Col. Bready: Yes, sir. We recognize the other difficulty, that the parties have some difficulty in knowing just what they do want, due to not knowing all our internal affairs. We will cooperate as much as we can.

The Court: Thank you very much. If you gentlemen want a place to confer, the bailiff will show you back to our law clerk's room or the witness room, and you may use that facility to work this problem out.

Mr. Lydick: Just five minutes.

Mr. Lincoff: May I address the court before you take your recess?

Mr. Lydick, in the interest of ascertaining what the entire facts are, may I inquire through the court what counsel proposes to have the witness produce, pursuant to subpoena?

I believe if there is only going to be a production of a partial file, I think that would be eminently unfair. I think the Colonel should be instructed by the court, and the subpoena should be broad enough to require him to produce such documents [295] as will present to the court an entire picture.

If there is one document referred to in the subpoena or if there is an answering letter or a corol-

lary to it, I think that file should likewise consist of those documents.

The Court: The court can't rule in advance upon the admissibility of evidence. We just trust to counsel, as being reasonable men, to see they ask for that which will be admitted.

We will appreciate the necessity of bringing in sometimes replies to letters and such other documents. Otherwise, we will have to have extended protracted revisits to the Colonel, and you can make a nuisance of yourself doing that. Since he is in a cooperative spirit, as the court thought he would be when I made the suggestion the other day, I think it would well behoove counsel to keep him that way.

Col. Bready: May it please the court, I am more than happy to cooperate with the plaintiff, as well as the defendant.

Mr. Lydick: If your Honor please, we particularly desire the records and files of the Department of the Army with respect to the final negotiations between Modern-Aire and the Department of the Army, and particularly the final cost submission.

The Court: Is it going to be of any considerable advantage if we simply recessed this matter until 2:00 o'clock, and either your joint or your separate conversations with the Colonel can be continued and you can get this matter and what documents you want settled? [296]

Mr. Lydick: I would suggest that perhaps we could hold a joint conference with the Colonel, and

if there is a disagreement between counsel and me about which was desired, I could serve a subpoena I desired and he could serve the one he desired.

The Court: The court came to the bench about the middle of a sentence in a memorandum that I am writing. If you would rather do that, I am in a receptive mood to taking up this afternoon.

Mr. Lydick: May I request a recess until this afternoon?

The Court: That will be granted. However, it is granted with a hope this will lead us where we won't have to work on this case on Friday. That is a hope. It is not a directive.

Mr. Lincoff: Your Honor, I would like to make a statement for the record, that I think I speak on behalf of all parties, and that I hope that regardless of what transpires we don't have to work on Friday. I don't know what the court's intention is in that respect. We will see what we can do with respect to this particular matter between now and 2:00 o'clock.

The Court: Thank you. We will recess until 2:00 o'clock.

(Whereupon, at 11:10 o'clock a.m., a recess was taken until 2:00 o'clock p.m. of the same day.) [297]

Afternoon Session, 2:00 p.m.

The Court: I hope the morning recess of the case was productive of some good.

Mr. Lydick: Your Honor, we prepared jointly a subpoena duces tecum which was designed to best

effectuate a quick presentation to Washington and a possible quick return.

The Colonel indicated to us that three weeks was the normal time for response and two weeks was excellent time. That he would make every conceivable effort, despite the guess that the Pentagon would be closed Wednesday, Thursday and Friday of this week, to have a response from them by Tuesday of next week.

The Court: Don't stall your case waiting for that. When we come to the point where everything is in, we will just recess to some date certain in the future and we will take it up then, at the recessed date.

LEONARD J. MILLS

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Lydick): Mr. Mills, can you tell me whether or not you gave any estimate of your cost of production of these goods to the United States Government prior to the time you entered [298] into a contract with them March 14th?

A. I did.

Q. Do you have any copies of those estimates?

A. No, sir, I haven't.

Q. Do you have any of the working papers that were used to prepare—

A. I beg your pardon. May I correct that answer? I haven't any copies of the 105 mm.

(Testimony of Leonard J. Mills.)

Q. You have copies of the 75—— A. Yes.

Q. That is the one you entered into?

A. The 105 is the one I entered into, that is right.

Q. Do you have any work papers from the estimates that you produced, that you used in making up those estimates?

A. All I have of the 105 mm contract, which is the sheet which I showed to you, which is a compilation of my figures prepared since we entered into this discussion with Deering-Milliken.

Q. By that you mean since you entered into this litigation?

A. Litigation, that is correct.

Q. Was it necessary for you, during your negotiations with the Government, to show them the details of your cost of production or estimated cost of production?

A. Yes, sir, it was. [299]

Q. Those cost figures were submitted to the Government in writing? A. That is correct.

Q. Did they change from time to time? That is, was there more than one submission with respect to the 105 mm contract?

A. There was a change. It was an increase in price on the 105 mm, yes, sir.

Q. Increase in price of your cost?

A. No, an increase in the price the Government gave me.

Q. Other than that, in your cost submissions, there were no changes?

(Testimony of Leonard J. Mills.)

A. No there was only one set of figures I submitted to the Government.

Q. Those were the ones that were accepted?

A. That is right.

Q. Do you recollect what the final cost figures were that you submitted?

A. You mean in dollars and cents, sir?

Q. Any way they were submitted, Mr. Mills.

A. Well, they were approximately \$13,000.00 less than the contract price of \$70,000.00.

Q. Do you recollect what your percentage of profit was that was shown in those submissions?

A. Am I correct in your prior question to this, as to [300] what my cost figures were, or as to what they were when I submitted them to the Government in the beginning?

Q. I wanted to know if you recollect what figures you submitted to the Government. You say you have no copies of them. I am trying to find out if you have any recollection.

A. I wish to change my prior answer.

Q. Oh.

A. My figures that I submitted to the Government originally, I don't recollect in dollars and cents what they amounted to now.

Q. Do you happen to recollect the percentage of profit figure you were allowed therein?

A. Yes.

Q. What figure was that?

A. The Government allowed me seven per cent

(Testimony of Leonard J. Mills.)

profit on both proposals, on the 75 and 105 mm, which amounted to \$14,000.00, approximately.

Q. Do you recollect what the percentage of profit was they allowed you in the final submission you gave to the Government on the single contract that you finally obtained?

A. There were no additional submission of figures, sir. My final price on the contract was approximately \$70,000.00, which results in an approximate profit of \$13,000.00 to me on that one contract.

Q. I am asking you if you recollect from the submission [301] you made at that time what the percentage of the profit was that the Government allowed you.

A. Yes, sir. I said seven per cent.

Q. Was there any separation of the percentage of profit after the one contract that was decided you would not get? In other words, was there a percentage of profit figure on the final contract you did get?

A. Only that, sir, I went back to the Government when they offered me just one contract in place of two and pointed out to them that I would only consider the contract with an increase in price, which would take care of my not getting the other contract.

And I got an increase in price, which brought my profit up to approximately \$13,000.00, which just about equaled the profit that the Government—that was on these proposals, totaling \$14,000.00.

Q. In other words, they were going to allow you

(Testimony of Leonard J. Mills.)

\$14,000.00 profit on both contracts and eventually they allowed you \$13,000.00 profit on one contract?

A. That is correct.

Q. Did you make any copies of your submissions at the time you prepared them for the Government?

A. Of the proposal?

Q. Yes.

A. No, sir. They only give me enough copies to submit [302] to them.

Q. Did you have any working papers from which you prepared those proposals?

A. Yes, sir. I used working sheets.

Q. But you no longer have them?

A. No, sir. I only have them, the compilation, a summary of those working sheets.

Q. When were they destroyed?

A. I don't recall just when they were destroyed.

Q. Before or after the beginning of this action?

A. They weren't destroyed until I had the figures compiled onto the records that I have in my files now.

Mr. Lydick: I move the answer is not responsive to the question, and ask the witness be instructed to answer the question.

The Court: Strike the answer. Miss Reporter, read the question.

(The question was read.)

The Court: Mr. Clerk, when was this action commenced?

Mr. Lydick: August 1952, I believe, your Honor.

The Clerk: August 19, 1952.

(Testimony of Leonard J. Mills.)

The Court: August 19, 1952, Mr. Witness. Now, that question doesn't call for an exact date. It calls for information as to whether the destruction was before or after the beginning of this lawsuit.

The Witness: Yes, your Honor.

The Court: Can you answer it?

The Witness: I am not sure. It was about the time—I am not sure whether it was before that date of August or just after we started corresponding with Deering-Milliken on this contract. It was at the time, though, I made a compilation of all those worksheets, which I now have.

The Court: But you are unable to say whether it was before or after the beginning of the litigation?

The Witness: No, sir, I am not able to say that.

Q. (By Mr. Lydick): You mentioned you had a written compilation which has been prepared since the beginning of this action. Is that correct?

A. That is right.

Q. Do you have that with you?

A. I believe Mr. Lincoff has that.

Mr. Lydick: May I see it?

Mr. Lincoff: Yes. I showed that to you the other day in the hall. This is it here, Mr. Lydick (indicating).

Mr. Lydick: Thank you. In order to conserve the time of the court, Mr. Lincoff, is it agreeable that my co-counsel copy this, so we may inspect it at some leisure instead of having to inspect it now and examining, and perhaps we can recall Mr. Mills

(Testimony of Leonard J. Mills.)

during our case and examine regarding these figures?

Mr. Lincoff: No, I have no objection. Will you kindly [304] have it marked for identification?

Mr. Lydick: Your Honor please, I present this document for identification only.

The Clerk: Plaintiff's exhibit?

Mr. Lincoff: Plaintiff's exhibit.

The Clerk: Plaintiff's Exhibit 17 for identification.

(The document referred to was marked

Plaintiff's Exhibit No. 17 for identification.)

Q. (By Mr. Lydick): Mr. Mills, did you ever produce any of the cartridge liners that were called for under this contract, either before or after you entered into the contract?

A. No, sir, I did not.

Q. Did you have any assistance by way of time studies in the preparation of your original computation for the Government or in the preparation of these computations?

A. Yes, I had the assistance of a qualified industrial engineer.

Q. His name? A. Mr. Henry Levor.

Q. And his address?

A. I haven't got his address offhand. I have his telephone number.

Q. Will you give me his telephone number?

A. Yes. STate 4-7541.

Q. What time did he help you? [305]

A. At the time I was figuring on the contracts

(Testimony of Leonard J. Mills.)

that were, the proposals that the Government had offered me.

Q. Which was prior to March 6, 1952?

A. Yes, sir, it was prior to then.

Q. And after December 18, 1951?

A. That is correct.

Q. Have you seen him since that time?

A. I am not sure if I had. I may have. I have talked to him since then.

Q. How recently have you talked to him?

A. Just a short time ago.

Q. A matter of days?

A. A matter of a week or so.

Q. A week? A. Yes.

Q. Did you discuss with him this action at the time you talked to him?

A. I advised him of what was taking place.

Q. Have you had any other assistance, other than that from Mr. Levor?

A. None that I can recall at the moment.

Q. Did the man whom you advised me at the deposition you employed as a foreman give you any assistance along these lines?

A. In my costs? [306]

Q. Yes. A. No, sir.

Q. Was he going to give you assistance of any kind?

A. Well, he was going to be my foreman once we got into production.

Q. Since you didn't get into production he didn't do anything about those liners?

(Testimony of Leonard J. Mills.)

A. He was employed by me for a period of time. We were getting the plant set up for production.

Q. What was his name?

A. I can't recall at the moment. I can find it.

Q. Did you pay him a salary?

A. Yes. I paid him a salary. I have his name and records. I just can't recall it at the moment.

Q. Will you bring it to court at the next court appearance?

A. I will. I will be glad to.

Q. When were you first aware that Deering-Milliken did not intend to deliver to you greige goods that would meet Specification PA-PD-29?

A. When Mr. Piersol called me on March 21st.

Q. When did the Government terminate your contract for failure to perform?

A. I am not certain of the date, sir. The letter is in my files. [307]

Q. Is that the letter of June 2, 1952?

A. It may be. I have the letter. I just don't recall the date.

Q. There is an exhibit, Mr. Mills, which is placed in evidence, Plaintiff's Exhibit 14, which is entitled "Notice of Termination for Default June 2, 1952." Is that the date you received notice of termination for default?

A. That is approximately the date.

Q. Could it have been a day or two after that, because of mail?

A. Yes. I had been advised prior to that I was going to receive it.

(Testimony of Leonard J. Mills.)

Q. Yes. That was the date of the formal notice?

A. That is correct.

Q. What did you do, if anything, during the period March 21, 1952, and June 2, 1952, with respect to obtaining the goods you required in order to permit you to perform your Government contract, from other sources?

A. I contacted other sources and attempted to get the goods from other sources. I also——

Q. Whom did you contact?

A. Paul Whitin & Company, for one.

Q. Yes.

A. J. P. Stevens & Co. and Iselin-Jefferson & Co.

Q. Are those precisely the same contacts you testified [308] to yesterday?

A. I believe so.

Q. Were there any others besides those three?

A. If there were, I don't recall who they were.

The Court: Were any of those three able to supply you or did they offer to supply you at any price?

The Witness: Yes, they all offered me goods. They weren't able to meet the delivery schedules as set up by the Government.

But the price they offered also was considerably in excess of the price I was to pay Deering-Miliken.

Q. (By Mr. Lydick): Did you make any effort whatsoever to obtain another or different delivery schedule from the Government?

A. No, sir, because of the fact at the time the

(Testimony of Leonard J. Mills.)

Government—the Ordnance Department at Pasadena was also attempting to use pressure from Washington to get Deering-Milliken to fulfill their contract.

Mr. Lydick: Your Honor please, I ask the answer be stricken as not being responsive and to have the question read.

The Court: Except for the answer “No, sir” the answer is stricken. The “No, sir” may stay in.

Mr. Lincoff: I do not wish, your Honor, to dispute your Honor’s ruling. I respectfully submit, your Honor, that the answer is one which, following the word “No,” constitutes an [309] explanation of the part of an effort and the result of the effort to obtain merchandise otherwise, or an explanation of why he did not obtain it at another place. I appreciate that I can establish it on redirect, but I think it is responsive to the question, your Honor.

Mr. Lydick: Your Honor please, I think it was simply a conclusion of the witness as to some things which he thinks might have occurred. I don’t know they did. He doesn’t know they did. It is probably based on hearsay. Anyway, it isn’t responsive to the question.

The Court: Anyway, the court has stricken it. It is a proper area of inquiry on redirect.

Mr. Lydick: Thank you, your Honor.

Q. (By Mr. Lydick): Now, when was the last inquiry you made to anyone in an attempt to obtain these goods from other sources? Was it one of these

(Testimony of Leonard J. Mills.)

three attempts which you have answer in writing for, except for Paul Whitin?

A. I am sorry, I didn't hear the final part of your question. I didn't follow it.

Q. I will rephrase it. It was compound and not a good question, Mr. Mills.

When was the last time you made an attempt to obtain these goods from any other source?

A. About the time I received the answer from Paul Whitin and Iselin-Jefferson, and J. P. Stevens; I got their [310] quotations.

Q. The quotations you refer to are those quotations in writing that were discussed here yesterday?

A. They were confirmed in writing, yes.

Mr. Lydick: If I am not mistaken, those letters were introduced for identification only. Is that correct, Mr. White?

The Clerk: Yes, sir.

Mr. Lydick: Could I see them just to confirm the dates on them?

The Clerk: Yes.

Q. (By Mr. Lydick): The letter from Iselin-Jefferson is dated March 31, 1952, and the letter from J. P. Stevens Company is dated April 4, 1952. Does that seem approximately correct to you, as being around the time you received them?

A. That is about the time I received the letters, yes.

Q. Between April 4, 1952, and June 2, 1952, what efforts, if any, did you make to secure this cloth from any other source?

(Testimony of Leonard J. Mills.)

A. I can't recall of any other efforts.

Q. What, if you know, had to be done to make the cloth that Deering-Milliken was offering you meet the Specification PA-PD-29?

A. I am not—I don't know just what had to be done.

Q. Were you told what this required?

A. Yes, I believe I was told what was to be required.

Q. Were you told by someone a party to this action or—— [311]

A. I was told by Mr. Piersol.

Q. What did he tell you would have to be done?

A. He said the mill advised him the goods had to be scoured in order to meet the porosity specification.

Q. What did he tell you, if he did tell you, would be the cost of that?

A. I don't believe he gave me a figure on the cost.

Q. Did you make any inquiry as to what the cost of scouring would be?

A. No, sir. I was advised what the cost of the scouring would be indirectly, if you wish to hear how.

Q. From what source?

A. From the Ordnance Department, who got the information from Mr. Harris, the vice president of Deering-Milliken.

Q. What was that figure?

A. Approximately three cents a yard.

(Testimony of Leonard J. Mills.)

Q. Did you make any effort whatsoever to obtain or locate facilities in the Los Angeles area that would scour the cloth for you?

A. No, I didn't know what facilities would be required.

Q. You had no sufficient knowledge of the term "scouring" to know what would be required for that?

A. That is correct.

Q. Did you make any inquiries from anyone as to what would be required in a scouring operation or who might perform [312] that kind of operation in this area?

A. No, sir, I did not.

Q. Did you read your contract with the Government dated March 14, 1952, before signing it?

A. I believe I did.

Q. Were you aware it contained a renegotiation clause?

A. The contract of March 14th—the final contract that I received, Mr. Lydick, did not contain a renegotiation clause.

Q. Was that the contract that you put in evidence here?

A. I believe so.

Q. Isn't it a fact, Mr. Mills, you misled the court when you said you had only been a party to one civil action in this community?

Mr. Lincoff: I will object to that, if your Honor please. I think it calls for a conclusion with respect to whether he has misled the court. I think he may inquire as to whether there were other suits and name them.

(Testimony of Leonard J. Mills.)

The Court: The form of the question is not good.

Q. (By Mr. Lydick): Mr. Mills, you formerly testified, I believe, in response to a direct question from me, you had only been a party to one other civil action or a witness in one other civil action in this community. Is that correct?

A. That is correct.

Q. Were you a party to a Municipal Court action entitled National Business Counsellors vs. Modern-Aire of Hollywood, [313] Inc., No. 26741, in which you filed an Answer in propria persona?

The Court: In what court?

Mr. Lydick: Municipal Court of the Los Angeles jurisdictional district.

The Witness: Sir, that case never did come to trial.

Q. (By Mr. Lydick): You were a party to that action, weren't you?

A. If such were so, I wasn't even represented by counsel.

Q. You represented yourself, didn't you?

A. That is right. It was just a small minor item. There never even—the opponents never even appeared.

Q. I am sure you will not mind my flattering you on the excellence of that Answer; it was very nicely done.

Were you a party in a Municipal Court action against Maurice E. Menze, No. 857554?

A. I don't know that party; never heard the name before.

(Testimony of Leonard J. Mills.)

Q. A claim for auto damage for your car in an auto parking lot.

A. Modern-Aire of Hollywood?

Q. No. Leonard J. Mills.

A. I don't even recall whether that was a case—yes, I am sorry, sir. It was up here on Temple Street, that little courtroom, I appeared in. There was a small damage to my car, a small claims court.

Q. The Municipal Court of the County of Los Angeles, Case No. 857554.

A. I am not sure.

Q. \$101.55.

The Court: I don't know what the question is. Are you asking whether he was a party to the litigation or whether he appeared in propria persona or whether he appeared as a witness? Or what is the inquiry?

Mr. Lydick: I am simply intending to impeach the witness with respect to his deliberate answer to the question that he had only been a party to one action in this area before?

Mr. Lincoff: I will object to that.

The Court: If that is important, I will hope you will treat it in your brief, with quotation from the transcript. It is my recollection he disclaimed giving testimony before, but did not go to the extent of denying the participation in lawsuits. And if that question had been asked, I think it would probably have gone beyond relevancy.

Mr. Lydick: The question was asked and it was not objected to by anyone and I have asked the

(Testimony of Leonard J. Mills.)

reporter to bring her notes and read the question to the court after the recess, and also the answer.

May I continue with this line of examination, and if it doesn't tie up the court——

The Court: Certainly. [315]

Q. (By Mr. Lydick): Were you a party to a Superior Court action in Los Angeles County involving Singer Metals, Inc. Mills, Arnold Mills and Fan Mills, doing business as L. J. Mills & Company vs. Industrial Management Corporation?

A. That is correct. I was a party to the suit, but I wasn't one of those suing, if I can phrase it in that way.

Q. I am not sure I understand what that means. You were a named plaintiff?

A. If I may explain.

Q. Go ahead.

A. There was a partnership in a certain transaction between Singer Metals, Warner Benner and Harold Benner and L. J. Mills & Co. with Industrial Management.

There was a suit brought on by Singer Metals, an estate of Seattle, against Industrial Management.

The attorney asked us, the estate of Harold Benner and Warner Benner and L. J. Mills to join with them in that suit for an accounting. We agreed to joining in that suit because we were a partner in the thing. They paid all the expenses and were the main litigants in it. I did not consider myself a party in it in that sense.

(Testimony of Leonard J. Mills.)

The Court: Did you appear and testify?

The Witness: I don't believe there was any testimony on my part.

Q. (By Mr. Lydick): Did you accept the benefits of a [316] judgment for L. J. Mills & Co. in the amount of \$7,000.00?

Mr. Lincoff: That is objected to, if your Honor please, as calling for a conclusion of the witness. I think that is clearly a matter of law, whether or not one accepts a benefit.

Mr. Lydick: I will rephrase the question.

Mr. Lincoff: It goes to a number of things. I object to the question on the ground it is incompetent, irrelevant and immaterial.

Q. (By Mr. Lydick): Did you receive any money as the result of the judgment in that action?

A. I did.

Q. Did you company receive some or you personally, or both?

A. The company received some.

Q. Didn't you receive a personal judgment for \$2,338.45, in addition to the company judgment of \$7,015.37?

A. If I did, that was just my share of the company. I was and my brother and my mother are all partners in L. J. Mills & Co. If I received a personal check it was just my share of the L. J. Mills & Co. check.

Q. I won't argue the question. Were you a party to an action of Evelyn Rogers vs. Leonard J. Mills, Superior Court No. 608051?

(Testimony of Leonard J. Mills.)

A. That case hasn't come up, and it has never been in court. [317]

Q. But you are a party to the action, named defendant? A. That is right.

Q. Were you a party to a Superior Court action of Sam Kline vs. Mills and Modern-Aire—

A. That is part of the same action.

Q. It is 610523. The other one is 608051; separate actions.

A. They may be separate. They are all part of the same thing. It hasn't come up.

Q. Do you wish to explain the nature of that action, as you did the others?

The Witness: If the court wishes—

The Court: I don't. He has answered the question. There isn't any question. I don't see the materiality of it.

For instance, on a case we had this morning, which was settled, an action against the Atchison, Topeka & Santa Fe Railway, was: Can people who sue them because of a railroad accident come in here and show that the Santa Fe has been a party to other litigation in other cases? I don't think it has any relevancy.

The original impression I had—you set me right if I am not appreciating what is going on in this phase of the case—was that this man claimed, when he came to the witness stand, a lack of familiarity with the duties of a witness and with the procedure in court. I took it that this questioning

(Testimony of Leonard J. Mills.)

[318] was designed to show that he is, in fact, familiar with the giving of testimony.

He was rather asked to be excused from the somewhat loquacious type of answer which includes a lot of conclusions and not appreciating he shouldn't bring in hearsay and so on. As part of the background of that he said, "Well, this role of being a witness in a lawsuit is new to me," and I take it you are undertaking to impeach that.

Mr. Lydick: No, your Honor. I asked a specific question, which the reporter will bring to this court, in which I said, "So long as we are on the subject—" It was after you had given a somewhat detailed estimation of the witness, of the function here in court, and I said, "So long as we are on this subject, will you tell me whether you have ever been a party to a civil action or a witness in a civil action prior to this time?"

And he said, "Yes, once."

I am trying to show that that testimony, I am trying to impeach that testimony by showing he has been a party to a civil action. Whether he has been a witness or not I don't know.

The Court: Isn't that rather collateral to the issue in litigation?

Mr. Lydick: I think one of the fundamental issues that will rest for the court's decision is the veracity and lack of veracity of both plaintiff's and defendants' witnesses. [319]

The Court: There has been no objection. What I have said has simply been to alert you to a tentative

(Testimony of Leonard J. Mills.)

feeling of the judge. If it is incorrect, it will be for you to treat in your argument.

Mr. Lydick: I will, your Honor.

Q. (By Mr. Lydick): Mr. Mills, were you a party on January 19, 1950, to an action in the United States District Court of United States vs. Leonard J. Mills, Arnold Mills and Mrs. Fan Mills, co-partners, doing business in the partnership known as L. J. Mills & Co.?

Mr. Lincoff: I object, if your Honor please, on the ground it is incompetent, irrelevant and immaterial. I haven't objected previously. We don't have a jury here and I am satisfied the court is able to sift the relevant from the irrelevant.

I don't know how much longer Mr. Lydick proposes to go on with this line of inquiry. And aside from being irrelevant, I think it is incompetent. How can it prove or disprove any issues in this case?

I submit that cross examination, even for impeachment purposes cannot go so far——

Mr. Lydick: I have finished.

The Court: You mean that is as far as you intended to go?

Mr. Lydick: No, I have another.

The Court: I am still of the view to show he is a [320] loquacious character, to show he had been a witness many times doesn't tend to impeach the testimony he didn't know what to do as a witness.

Mr. Lydick: I hope to convince the court my question was a correct question, which he undoubt-

(Testimony of Leonard J. Mills.)

edly heard and he answered correctly, and involved not only his appearance as a witness but that he was a party. I will be able to show that after recess.

The Court: I don't think it means anything. You will have to argue it. We will overrule the objection.

Q. (By Mr. Lydick): Were you aware of the penalty clause in your government contract at the time you signed it?

Mr. Lincoff: I object, if your Honor please. I appreciate technically it asks for a matter of something in his personal knowledge. The contract itself contains all the terms and if it contains such a clause, it contains it. If it doesn't, it doesn't. That can be best determined by the best evidence rule and not by secondary evidence in the nature of a witness' recollection.

The Court: I take it this inquiry goes to show the knowledge in this man's mind, which he had or didn't have. It might have a bearing upon a duty to mitigate damage; is that it?

Mr. Lydick: That is right.

The Court: Overruled. [321]

Q. (By Mr. Lydick): Were you aware of the penalty clause in your government contract at the time you signed it?

A. I am not sure of the clause you are referring to.

Q. You had read the contract at the time you signed it? A. I did.

Q. Was this contract, which you have offered in

(Testimony of Leonard J. Mills.)

evidence here, the entire contract you had with the United States Government?

A. That is correct.

Q. Tell me, if you know, the customary procedure in the textile industry for obtaining a quotation on large quantities of rayon cloth.

Mr. Lincoff: If your Honor please, again I will object upon these grounds severally:

A, it is incompetent, irrelevant and immaterial, and not admissible under the pleadings. The defendant's answer raises no affirmative allegations with respect to custom and usage or practice in any trade or industry. We are here suing upon the theory of a contract.

Now, if the attempt is to show that a contract is ambiguous in any respect and, consequently, we have to resort to defining terms, I think that has to be asserted affirmatively in the defendant's pleadings.

What difference does it make, your Honor, what the custom may have been with respect to getting a whole quantity, something [322] less than a big quantity, or a small quantity? The only issue here, as I understand it, will be with respect to an interpretation that the court may want on the term "in the greige," and how is that related in determining how you order a quantity, how is it to define what a quantity is? Is it a million or ninety-four, ninety-five thousand? Where do you draw the line with respect to a quantity, small or large quantity?

(Testimony of Leonard J. Mills.)

I object on those grounds; it is entirely incompetent, irrelevant and immaterial.

The Court: The court will sustain its own objection and leave yours, your lodged objection, for comment by counsel, in view of the fact you are going to file briefs. I will rule out the testimony on the ground it is not proper cross examination.

Mr. Lydick: Counsel, will Mr. Mills be in court for the balance of the trial?

Mr. Lincoff: Mr. Mills will be here at all times.

Mr. Lydick: He will be available for me to call him during my case in chief?

Mr. Lincoff: Any time you wish him he will be here throughout the proceedings.

Mr. Lydick: No further questions, Mr. Mills.

Mr. Lincoff: May I ask now for a few moments' recess? I would like an opportunity to examine the government contract again. [323]

The Court: Let the clerk know when you are ready to re-assemble.

(Short recess taken.)

Mr. Lydick: Your Honor please, just before we proceed, the reporter was able to locate the question I asked, to which I had reference, and both Mr. Lincoff and I have had an opportunity to hear it read.

Would you mind reading it to the court at this time, Madam Reporter, and then we can go on with the cross examination.

(Whereupon, the following portion of the record was read:

(Testimony of Leonard J. Mills.)

“Q. (By Mr. Lydick): As long as we are on the subject, Mr. Mills, have you ever at any time before been a party to any civil or criminal action, or have you ever appeared as a witness in any action whatsoever? “A. Yes.

“Q. How many times?

“A. Once, I believe.

“Q. Where was that?

“A. Here in Los Angeles.

“Q. You appeared as a witness in that action?

“A. I did.”)

Mr. Lydick: No further questions. [324]

Redirect Examination

Q. (By Mr. Lincoff): Before we leave that subject, Mr. Mills, one time you testified, I think, was in Superior Court action, is that correct?

A. That is correct.

Q. And you testified a second time in a Superior Court action? A. That is correct.

Q. When did you recall or how did you refresh your recollection as to having testified on a second occasion?

A. I just called the attorney and asked him whether I was a witness in that case there, whether I was on the stand there and he advised me yes, I had gone up on the stand.

Q. You testified once in small claims action?

A. That is correct. I didn't realize I was a witness in that court. I mean it wasn't—I am sorry, your Honor, but if I may explain, it was in the

(Testimony of Leonard J. Mills.)

small claims court and the party that hit me and I both appeared before the judge, the bench there. I didn't think it was in the form of a court, the way we both explained our stories and the matter was settled right there.

Mr. Lincoff: Of course, the court knows attorneys are not permitted to practice in small claims court, so I am satisfied Judge Tolin knows what transpired in small claims [325] court.

If I may inquire through the court, I have examined Exhibit 12 and I have found nothing in the nature of a penalty clause. If counsel will point out to me, I will be happy to look at it.

There is nothing designated as such, and consequently I have found nothing on which to make inquiry.

Mr. Lydick: The government contract, Exhibit 12, Section 11, "Default."

If the court please, is counsel suggesting that perhaps his client didn't know what I was talking about?

Mr. Lincoff: I think the word "penalty" was used.

The Court: I don't know what is going on.

Mr. Lydick: I don't, either.

Mr. Lincoff: I don't, either.

The Court: If someone asks a question or makes a motion, then the court has something to rule on. But the comparative degree of familiarity of counsel with the exhibit is something that is of slight interest to me.

(Testimony of Leonard J. Mills.)

Q. (By Mr. Lincoff): Mr. Mills, you testified, in response to a question on cross examination, that Mr. Piersol told you that there would have to be some scouring done to the cloth, is that correct?

A. That is correct.

Q. Will you state when it was that Mr. Piersol told you [326] that? Give me just the time or the date, if you can.

A. Approximately a week or more after the 21st of March Mr. Piersol himself learned what was required then from the Military and explained it to me, that the goods had to be scoured in order to meet the porosity.

Q. Now, where was it that this conversation took place, in which Mr. Piersol gave you this explanation?

A. I am not sure whether it was on the phone or in his office.

Q. Will you relate what was said on the occasion of that conversation, relating what you said and what Mr. Piersol said relative to the subject of scouring the goods?

A. To the best of my recollection Mr. Piersol said that he had learned that the goods had to be scoured in order to get it to meet the porosity test.

Q. And what did you say?

A. I just accepted the information. I don't recall what my answer was.

Q. Is that the first time that Mr. Piersol had ever told you that anything would have to be done to the goods by way of scouring?

(Testimony of Leonard J. Mills.)

A. That is the first time; other than that, the TWX mentioned it.

Q. I am talking about what Mr. Piersol told you. A. That was the first time. [327]

Q. Did Mr. Piersol at any time, between the time of your first contact with him and the occasion which you have just mentioned, tell you that any finishing or any processing or any scouring had to be done to that goods?

A. No, sir, he did not.

Q. The first knowledge you had that any additional work had to be done was on the occasion of March 21st teletype and an occasion subsequently, when the word "scouring" was mentioned, is that correct? A. That is correct.

Mr. Lincoff: Now, Mr. Clerk, may I have Exhibits 15 and 16 for identification, please?

The Clerk: Yes.

Q. (By Mr. Lincoff): I place before you, Mr. Mills, Plaintiff's Exhibits 15 and 16 now marked for identification, and ask you to examine those documents.

Did you receive those documents, Exhibits 15 and 16 for identification, in response to an inquiry which you made for procuring this cloth elsewhere?

A. Yes, I did.

Q. By referring to the dates, can you state when it was that you received Plaintiff's Exhibit 15?

A. Plaintiff's Exhibit 15 I received on approximately the 4th of April.

(Testimony of Leonard J. Mills.)

Q. When is it that you received, to the best of your [328] recollection, Plaintiff's Exhibit 16?

A. Oh, approximately the 31st of March.

Mr. Lincoff: We will offer in evidence at this time, if your Honor please, Plaintiff's Exhibits 15 and 16.

Mr. Lydick: If your Honor please, I object to the introduction into evidence of the letters. Persons who wrote those letters and explained the background and circumstances surrounding the writing of them are right here in Los Angeles and can be called to testify.

I see no reason at all why we should have to accept the communications, unless he knows the nature of the inquiry and other circumstances and facts that may have occurred that led to the writing of these letters on these dates.

The Court: May I have the last few questions and answers?

(The record was read.)

The Court: By themselves, of course, they are insufficient to have any control in the deliberation here. But you can only do one thing at a time.

I assume they will be connected up. Hence, they will be provisionally admitted, the provision being, of course, there will be proper testimony to bring them into their correct setting.

(The documents heretofore marked Plaintiff's Exhibit Nos. 15 and 16 were received in evidence.)

Q. (By Mr. Lincoff): Now, Mr. Mills, did you

(Testimony of Leonard J. Mills.)

at any time [329] ascertain what it would have cost you to procure this cloth, as per Specification PA-PD-29, from another source?

A. I found that it would be approximately \$10,000.00 more to obtain this cloth from Paul Whitin Manufacturing Company, which was the cheapest source obtainable, to my knowledge.

Mr. Lydick: If your Honor please, it appears to me that is pure hearsay. I would like to know precisely what it was based upon.

The Court: Develop what it was based upon, counsel. That was a comment, it wasn't a motion.

Mr. Lydick: Particularly with respect to whether or not anyone representing my client was present while these conversations were going on.

The Court: If you make a motion to strike it, then I have something on which to rule.

Mr. Lydick: I move to strike, your Honor.

The Court: Motion granted.

Mr. Lincoff: Now, Plaintiff's Exhibits 6 and 7, may I have those, please, Mr. Clerk?

The Clerk: Yes.

Q. (By Mr. Lincoff): Those, you recall, Mr. Mills, are the two letters you testified you procured on about the same date in Mr. Piersol's office, that is, March 6, 1952? You remember that? [330]

A. Yes.

Q. I believe Mr. Lydick questioned you at length about the contents of Plaintiff's Exhibit 7 and particularly the second paragraph of that letter.

(Testimony of Leonard J. Mills.)

Would you read it to refresh your recollection, as to its contents, before my next question?

A. You want me to read it to the court, sir?

Q. No, just to yourself.

Mr. Lydick: Excuse me, counsel. Is that Exhibit 7?

Mr. Lincoff: 7.

The Witness: I have read it.

Q. (By Mr. Lincoff): You notice that says, among other things, "subject to your receipt of the contract from the Government"?

A. That is correct.

Q. Did you do anything subsequent to March 6th with respect to notifying Mr. Piersol that you had received the contract?

A. Yes, sir, I did.

Q. What did you do?

A. On March 10th, I believe approximately March 10th I had advised him I had received the advance copy of the government contract.

Q. What had you told him on March 6th, on the occasion of your meeting him in his office, with reference to a contract [331] from the Government?

A. That I had a contract with the Government subject only to his giving me confirmation of the fact that I have contracted for the goods with Deering-Milliken.

Q. Now, you did subsequently receive the contract from the Government, which is in evidence as Plaintiff's Exhibit 12? I will show it to you, to

(Testimony of Leonard J. Mills.)

be sure you and I are talking about the same document.

A. Would you repeat the question?

Mr. Lincoff: Please read the question.

(The question was read.)

The Witness: I did.

Q. (By Mr. Lincoff): Is that the contract that you received or a copy of it? Did you call Mr. Piersol to tell him you had received the Government contract?

A. Yes, I did call him.

Q. Now, Mr. Mills, Plaintiff's Exhibits 9 and 10 I will place before you.

Plaintiff's Exhibit 9 is the check which you issued to Deering-Milliken?

A. That is correct.

Q. Had you had a conversation with Mr. John Smith in New York prior to the issuance of that check?

A. I spoke to the credit manager of Deering-Milliken. I am not sure his name now was Mr. Smith, but he was the [332] credit manager that Mr. Piersol asked me to call in New York.

Q. Now, when you talked with him, will you relate again what your conversation with him was with respect to payment of moneys on the contract?

A. First I explain to him the meaning of the 90 per cent partial payment clause in the government contract, on the basis of the explanation of the type of contract that I had with the Government.

We arranged that I would pay a sum equal to 10 per cent of the total contract, Deering-Milliken

(Testimony of Leonard J. Mills.)

contract, in payment for the last 10 per cent of the goods to be delivered to me.

Q. And subsequently, subsequent to the conversation with the gentleman in New York, you prepared the check on or about the date it bears, is that correct? A. That is correct.

Q. I am referring again to Plaintiff's Exhibit 9.

A. I am sorry. Would you repeat your question?

Mr. Lincoff: Will you read the question?

(The question was read.)

The Witness: Subsequent to the conversation I did prepare the check, when Mr. Piersol——

Q. (By Mr. Lincoff): That is going to be my next question. Don't anticipate. A. O.K.

Q. Who made the specific request of you that you prepare [333] this check?

A. Mr. Piersol called me and advised me that New York had requested him to obtain the check from me.

Q. Then you prepared it on or about the date it bears? A. That is correct.

Q. You said, I believe, you took it up to Mr. Piersol's office personally?

A. That is correct.

Q. Did he hand you at that time Plaintiff's Exhibit 10? A. That is correct.

Q. It was delivered to you manually and not through the mail, is that correct?

A. That is correct.

Mr. Lincoff: No further questions on redirect.

Mr. Lydick: I have just one question.

(Testimony of Leonard J. Mills.)

Recross Examination

Q. (By Mr. Lydick): The circumstances regarding this telephone conversation you had with someone in our New York credit department, Mr. Mills, is very important to the case.

Would you make every effort possible to recollect the name of the person you talked with?

A. I am unable to recall the name now, since it doubtless was put in my mind as to whether it was Mr. Smith.

Q. Where did you get the name Smith, again?

A. Mr. Lincoff mentioned the name as Mr. Smith. I don't know whether he obtained it from Mr. Piersol—I can't answer that.

Q. You just can't remember the name of the man?

A. I can't recall the name of the man.

Q. Was it a Mr. John McEwen, perhaps?

A. It may have been. I just can't recall. It was that long ago; I just spoke to the gentleman that one time.

Q. Was it a Mr. Ferris, perhaps?

A. It is difficult for me to remember. John McEwen, that name sounds familiar, but I am not able to say that is it or not.

Q. Does Mr. Monahan sound familiar?

A. Yes.

Q. McEwen sounds more familiar than Ferris?

A. I would only be straining my memory, to attempt to guess at one or the other. It was the

(Testimony of Leonard J. Mills.)

gentleman Mr. Piersol told me to call, that I spoke to.

Q. Are these words you recall so precisely your exact recollection or the gist of the conversation?

The Court: I don't think that the recollection was precise. It seemed to me he testified, rather, to a legal effect, as he thought it existed.

If you want to get him to state it precisely, you might do so. Otherwise, I am not going to consider that he recalled [335] the conversation at all.

Mr. Lydick: No further questions, your Honor.

Mr. Lincoff: That is all.

The Court: Thank you, Mr. Mills.

The Witness: Thank you.

(Witness excused.)

Mr. Lincoff: At this time I would like to call Mr. Lee Piersol under Rule 43 (b) of the Rules of Federal Procedure.

LEE PIERSOL

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Please be seated. State your full name, sir.

The Witness: Lee Piersol.

Direct Examination

Q. (By Mr. Lincoff): Where do you live, Mr. Piersol? A. 732 Irolo Street, Los Angeles.

(Testimony of Lee Piersol.)

Q. You are the regional manager of Deering-Milliken Co., is that correct? A. Yes, sir.

Q. As such you are the man in charge of the local office and of final decisions with respect to the conduct of business in your local office, is that not true?

A. Well, I wouldn't like to say that was true, because I don't have final decisions on lots of things that go [336] through my office.

Q. Unless it goes——

A. I say I do not have final decision on lots of things that go through my office.

Q. But you are the man who has the final decision with respect to business in your local office, do you not?

A. Well, sir, I don't exactly understand that question.

Q. Well, Mr. Piersol, I want to call your attention to the taking of your deposition on March 31, 1953, and April 2, 1953. You recall that, do you not?

A. Yes, I do.

Mr. Lincoff: May I inquire of counsel, through the court, whether there are any corrections appearing upon the deposition of Mr. Piersol at page 19.

The Court: How are you using this, to refresh recollection or to impeach?

Mr. Lincoff: To impeach, your Honor.

The Court: Then you have a right, Mr. Witness, to see it if you wish.

The Witness: I would like to see it, sir.

The Court: When you put your question show——

(Testimony of Lee Piersol.)

Mr. Lincoff: Yes, I propose to put the original before him.

The Court: Yes.

Mr. Lincoff: Do you have the original deposition, Mr. [337] Lydick?

Mr. Lydick: Yes.

Q. (By Mr. Lincoff): Mr. Piersol, will you be kind enough to turn to page 19 of your deposition?

A. Yes, sir.

Q. I direct your attention particularly to lines 11 through 13. I will read as follows, and ask you whether or not this question was not put to you on March 31, 1953, and if you did not give the answer which appears there:

“Q. And final decisions, such as they may be with respect to business in the local office, are made by you? “A. Yes, sir.”

A. Yes, I did say that.

Q. I will also ask you if you will please, Mr. Piersol, turn to page 65 of your deposition.

A. (Witness complies.)

Q. And direct your attention particularly commencing at line 21 and going over to line 4 on page 66. I will read the question and the answer, and ask you whether or not on the occasion of April 2, 1953, which was the continued taking of the deposition, whether you did not, in response to the questions put, give the answers there appearing——

Mr. Lydick: Counsel, there is a correction appearing on this page, which I advised you of prior

(Testimony of Lee Piersol.)

to trial. That is [338] in line 22. Mr. Piersol wishes to change the phrase "general manager" to "regional manager."

Mr. Lincoff: I wasn't aware of it. I don't recall that you did or didn't, Mr. Lydick.

Q. (By Mr. Lincoff): Very well. Commencing at line 21, this question in part was put to you:

"I believe you testified, did you not, that you have been general manager since 1943?"

That you have changed that by changing the word "general" to "regional." "A. Yes.

"Q. You are the gentleman with the so-called final say on all matters having to do with the conduct of the local office, is that correct?

"A. That is correct.

"Q. And that has been the case since 1943 up to date? "A. Yes."

Did you give those answers in response to those questions? A. Yes, I did.

Q. Now, Mr. Piersol, do you know the president of the plaintiff corporation, Mr. Leonard Mills?

A. Yes, sir.

Q. You may put the deposition down, Mr. Piersol. A. All right. [339]

Q. When did you first meet Mr. Mills?

A. About the 21st of December 1951.

Q. Was that a meeting face to face or was that as a result of a telephone conversation?

A. My recollection is it was as a result of a telephone call.

(Testimony of Lee Piersol.)

Q. Did you have a conversation with Mr. Mills on that occasion over the telephone?

A. I believe I did.

Q. Will you relate, as best you can recall, what you said and what Mr. Mills said on the occasion of your first telephone conversation?

A. Mr. Mills introduced himself as a manufacturer of objects made of textiles, and he said that he was interested in obtaining from the company I represented a quotation on from four to five hundred thousand yards of natural or unbleached rayon of certain widths and a certain weight. That is what Mr. Mills asked me. Did you ask what I said to Mr. Mills?

Q. Yes. Now will you say what you told Mr. Mills?

A. I told Mr. Mills I would be glad to report his inquiry to our home office in New York, and reply to him as soon as I had a reply for him.

Q. Was that the end of the conversation?

A. I don't remember anything beyond that.

Q. Very well. Now, did you make an inquiry of your home office with respect to Mr. Mills' original inquiry to you?

A. Yes, I did.

Q. In what form did you make it, teletype or by letter?

A. I made it by letter.

Q. Do you have a copy of the letter here in court with you, Mr. Piersol?

A. I don't know whether the letter is here now or not.

Q. Was there not served upon you, Mr. Piersol,

(Testimony of Lee Piersol.)

as an officer of Deering-Milliken Co. a subpoena duces tecum?

Mr. Lydick: I have the letter, counsel, in response to service of the subpoena.

Mr. Lincoff: May I ask, through the court, if he will kindly produce the letter or copy thereof?

Mr. Lydick: I have no objection to producing the letter. I point out to counsel that the service was improper. We do have the file, though.

The Court: If what you are saying is something the court is supposed to hear or which is going in the record, we are not hearing you. I am sure the reporter is not, either.

Mr. Lydick: I was stating to counsel, and pointing out the fact service was improper. We are perfectly pleased to produce the document you requested.

Mr. Lincoff: This is the first I heard of any attack [341] on sufficiency of service.

Mr. Lydick: I won't make any issue of it, but the service was improper.

The Court: We have enough to do to decide the disputed issues.

Mr. Lincoff: Will you please mark this for identification?

The Clerk: Plaintiff's?

Mr. Lincoff: Yes.

The Clerk: Plaintiff's Exhibit 18 for identification.

(The document referred to was marked

Plaintiff's Exhibit No. 18 for identification.)

Q. (By Mr. Lincoff): I place before you, Mr. Piersol, what has been marked for identification as

(Testimony of Lee Piersol.)

Plaintiff's Exhibit 18. Would you kindly read the document before I put my next question to you?

A. Yes. I have read it.

Q. Was that the communication which you directed to New York? A. Yes, sir.

Q. And was it directed to New York on or about the date it bears? A. Yes, sir.

Q. What date does it bear, sir?

A. December 21, 1951.

Mr. Lincoff: We will offer this in evidence, if your [342] Honor please, as Plaintiff's Exhibit next in order.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 18 was received in evidence.)

Q. (By Mr. Lincoff): Will you kindly place it before his Honor, Judge Tolin, please?

A. Yes.

The Court: Place it before the clerk. The clerk marks them into evidence and the clerk hands them up to the court.

Mr. Lincoff: I beg your pardon.

The Court: We have to keep our record clear.

Q. (By Mr. Lincoff): Did you subsequent to the date of your inquiry to New York receive a response to it? A. Yes, sir, I did.

Q. And in what form did you receive the response?

A. I am not sure now whether it was teletype or letter. I think it was teletype.

(Testimony of Lee Piersol.)

Q. Do you have the communication received from New York whether it be teletype or letter?

A. I think it is probably present.

Mr. Lincoff: May I ask it be produced?

Q. (By Mr. Lincoff): Do you remember approximately how soon after your initial inquiry to New York it was you received the response from the New York office?

A. I believe it was about January 10th. [343]

Mr. Lincoff: Please mark this for identification.

The Clerk: Plaintiff's 19 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 19 for identification.)

Mr. Lincoff: Your Honor, excuse me while I confer with co-counsel.

The Witness: I think, if I may make another statement, I think it could have been later than January 10th, possibly January 19th.

Q. (By Mr. Lincoff): Well, I will do what I can to assist in your refreshing your recollection, by placing before you a document which has been marked for identification as Plaintiff's Exhibit 19.

A. That is right, January 9th.

Q. Does that refresh your recollection, Mr. Piersol, as to when you first received a response to your initial inquiry to New York?

A. According to my recollection, that is the response to it (indicating).

Q. You received that on or about the date it bears, is that correct, sir?

A. I believe I received it on January 9th.

(Testimony of Lee Piersol.)

Q. I notice there, Mr. Piersol, that there are two other messages. None of those, however, have any reference to Modern-Aire, to the best of your knowledge or observation, [344] do they?

A. No, sir, they do not.

Q. It is only the one appearing last in order on that sheet? A. Yes, sir.

Q. Who is Mr. Lovett, Mr. Piersol?

A. Mr. Lovett is a salesman in our New York office.

Q. To your knowledge that is the Mr. Lovett whose name appears on this document, is that correct? A. Yes, sir.

Mr. Lincoff: We will offer this in evidence, if your Honor please, as Plaintiff's exhibit next in order.

The Court: Admitted.

(The document heretofore marked Plaintiff's Exhibit No. 19 was received in evidence.)

Q. (By Mr. Lincoff): Now, subsequent to the receipt of Plaintiff's Exhibit 19, sir, which is the teletype response from Mr. Lovett, did you call Mr. Mills at all?

A. Yes, sir, I am sure I did.

Q. And to the best of your recollection when was it that you called him?

A. To the best of my recollection I called him on the 9th of January, the day I received the teletype.

Q. Did he come to your office in response to your call?

(Testimony of Lee Piersol.)

A. I don't have a clear recollection of that.

Q. But you had a conversation with him on that date?

A. Yes.

Q. Will you relate the conversation, sir, stating what you said and what Mr. Mills said?

A. I told Mr. Mills the contents of the teletype, with reference to Government Specification PA-PD-29, as to which he inquired, and I told him that we could only quote on the narrower than the widths inquired about, for our mill could not make goods as wide as 55 inches, which was the wider of the two, and that we were quoting in the greige.

Q. If I may interject, I am having a little difficulty hearing you, as a result of your keeping your hands in front of your face.

The Court: I see counsel indicating difficulty. Bear in mind this is a very large room, and we have to speak up.

The Witness: I will try to do better.

Mr. Duque: May we have the answer read up to this point? I couldn't hear any of it.

The Court: Read the question and the answer.

(The record was read.)

Q. (By Mr. Lincoff): Incidentally, you had used the term "in the greige" prior to the occasion which you have now mentioned, had you not, Mr. Piersol?

A. Since I have been here on the stand?

Q. No, sir. Prior to having—— [346]

A. I believe I mentioned it prior to it because

(Testimony of Lee Piersol.)

I—it was my understanding I was talking about greige goods.

Q. What is your interpretation of the meaning of the phrase “in the greige”?

A. “Greige” means goods that, as they come off of the looms.

Q. That is, of course, without reference to color or bleaching or unbleaching, is that correct?

A. That is correct, yes.

Q. That is what you meant when you sent your first communication to New York, is that correct?

A. That is what I meant, yes.

Q. At the first time that you made your communication to New York, you specified, did you not, according to Specification PA-PD-29 in the greige?

A. I don't believe I used the word “greige” at that time. I used the words that Mr. Mills gave to me, which were “natural or unbleached,” which meant greige to me.

Q. You subsequently, however, or, it was your understanding of the phrase “in the greige,” at least, up to the time of the taking of your deposition, that it always was simply as it came off the loom, is that correct?

A. Yes, sir.

Q. Now, was there anything further said in the conversation you had with Mr. Mills subsequent to the receipt of the [347] teletype, Plaintiff's Exhibit 19?

A. I believe in that conversation Mr. Mills said that he would like to have a 60-day option on our quotation.

(Testimony of Lee Piersol.)

Q. Mr. Mills, did he say anything else?

A. I think he said his reason for the 60-day option was it took a considerable length of time to go through the government processes.

Q. Did you ever write a letter to Mr. Mills subsequent to the conversation, following the receipt of Plaintiff's Exhibit 19, Mr. Piersol?

Perhaps I can refresh your recollection.

A. I believe I wrote a letter on that day.

Mr. Lincoff: May I have Plaintiff's Exhibit 1, please, Mr. Clerk?

The Clerk: Yes.

Q. (By Mr. Lincoff): I will place before you, Mr. Piersol, what has been previously admitted in evidence as Plaintiff's Exhibit 1, and ask you to read the document before I ask you my next question.

A. (Witness complies.)

Q. Is that the letter that was written subsequent to the conversation which you have just related that took place upon receipt of Plaintiff's Exhibit 19, the TWX from Mr. Lovett?

A. That was the day I talked to Mr. Mills, or the day after I talked to him. [348]

Q. It was subsequent to that conversation that you wrote the letter, Plaintiff's Exhibit 1, is that correct?

A. I believe so, to the best of my recollection.

Q. There is no mention in the letter, which you have before you, of any option, is there, Mr. Piersol?

(Testimony of Lee Piersol.)

Mr. Lydick: Your Honor please, I have heard this objection enough during the time of the course of this trial, that the document speaks best for itself, so I object to the question on that ground.

The Court: Sustained.

Q. (By Mr. Lincoff): Now, subsequent to your writing Plaintiff's Exhibit 1, which you have before you, did you have any other conversation with Mr. Mills?

A. I am not sure I had any other conversation with Mr. Mills in that, near that date.

Q. To the best of your recollection when was it that you first had a conversation subsequent to the one preceding the letter of January 10th, Plaintiff's Exhibit 1?

A. I believe it was early in the month of February.

Q. Now, had you at any time subsequent to Plaintiff's Exhibit 1 received any shipping instructions with respect to this cloth that Mr. Mills wanted?

A. I don't remember, but I hardly think so.

Q. When is the first time that you received any information relative to shipping instructions, to the best of your [349] recollection, Mr. Piersol?

A. To the best of my recollection it was somewhere around March 4th.

Q. March 4th of 1952? A. 1952, yes.

Q. Let's go back so I may keep the chronology correct.

(Testimony of Lee Piersol.)

Mr. Lincoff: May I have Plaintiff's Exhibit 2, Mr. Clerk, please?

The Clerk: Yes.

Q. (By Mr. Lincoff): I hand you Plaintiff's Exhibit 2 in evidence, Mr. Piersol. That, of course, bears the signature of Henry Kramer.

Your counsel and I have stipulated there is no question but what that is his signature on the document and it was issued out of your office.

Did you ever see that letter at all? I am now referring to Plaintiff's Exhibit 2.

A. I think I saw it; I am not sure I did.

Q. Mr. Henry Kramer is an employee in your office?

A. Yes, he is my assistant.

Q. And he was on or about the date that letter bears? A. Yes.

Q. Does that letter refresh your recollection as to whether you had any conversation with Mr. Mills on or about January 16th? [350]

A. I do not think I had any conversation with Mr. Mills at that time.

Q. Very well. Now, to the best of your recollection you had your first conversation with Mr. Mills when after January 10th, Plaintiff's Exhibit 1?

A. About the 8th of—the 19th of February, I believe.

Q. 19th of February?

A. Along about the 19th of February. I won't say definitely the 19th of February.

(Testimony of Lee Piersol.)

Q. I will try to assist you in refreshing your recollection.

Mr. Lincoff: May I have Plaintiff's Exhibit 3 in evidence, please?

The Clerk: Yes.

Q. (By Mr. Lincoff): I will place before you Plaintiff's Exhibit 3, Mr. Piersol, and ask you to examine that document which also bears the signature of Mr. Henry Kramer.

Does an examination of that document refresh your recollection as to whether you had a conversation with Mr. Mills on or about that date?

A. I don't believe I had a conversation with Mr. Mills about that date.

Q. Now, the other occasion when you had your conversation in February, when was it that you said that conversation took place, to the best of your recollection? [351]

A. My recollection is it must have been around the 19th of February.

Q. Where did the conversation take place?

A. I am not sure whether it was in my office or by telephone.

Q. Would you relate what the conversation was, stating what you said and what Mr. Mills said?

A. I believe it related to Mr. Mills asking me for a better quotation than we had made him.

Q. What did you say to Mr. Mills?

A. I think I said I would find out from our New York office, or would find out from the mill whether we could make a better quotation.